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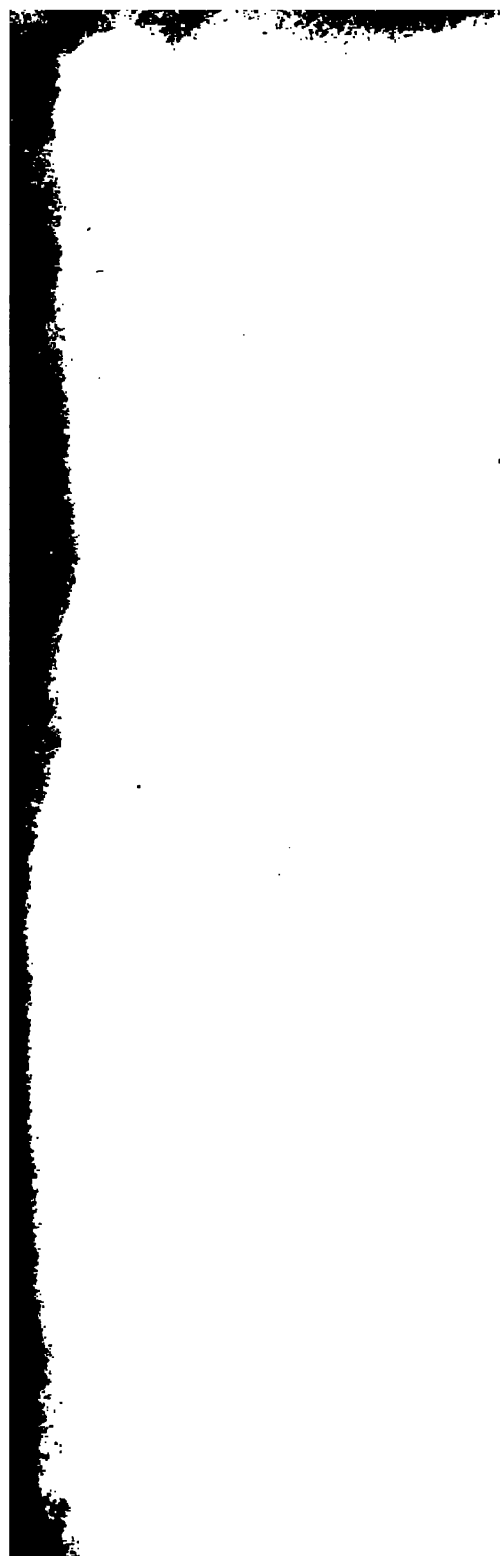
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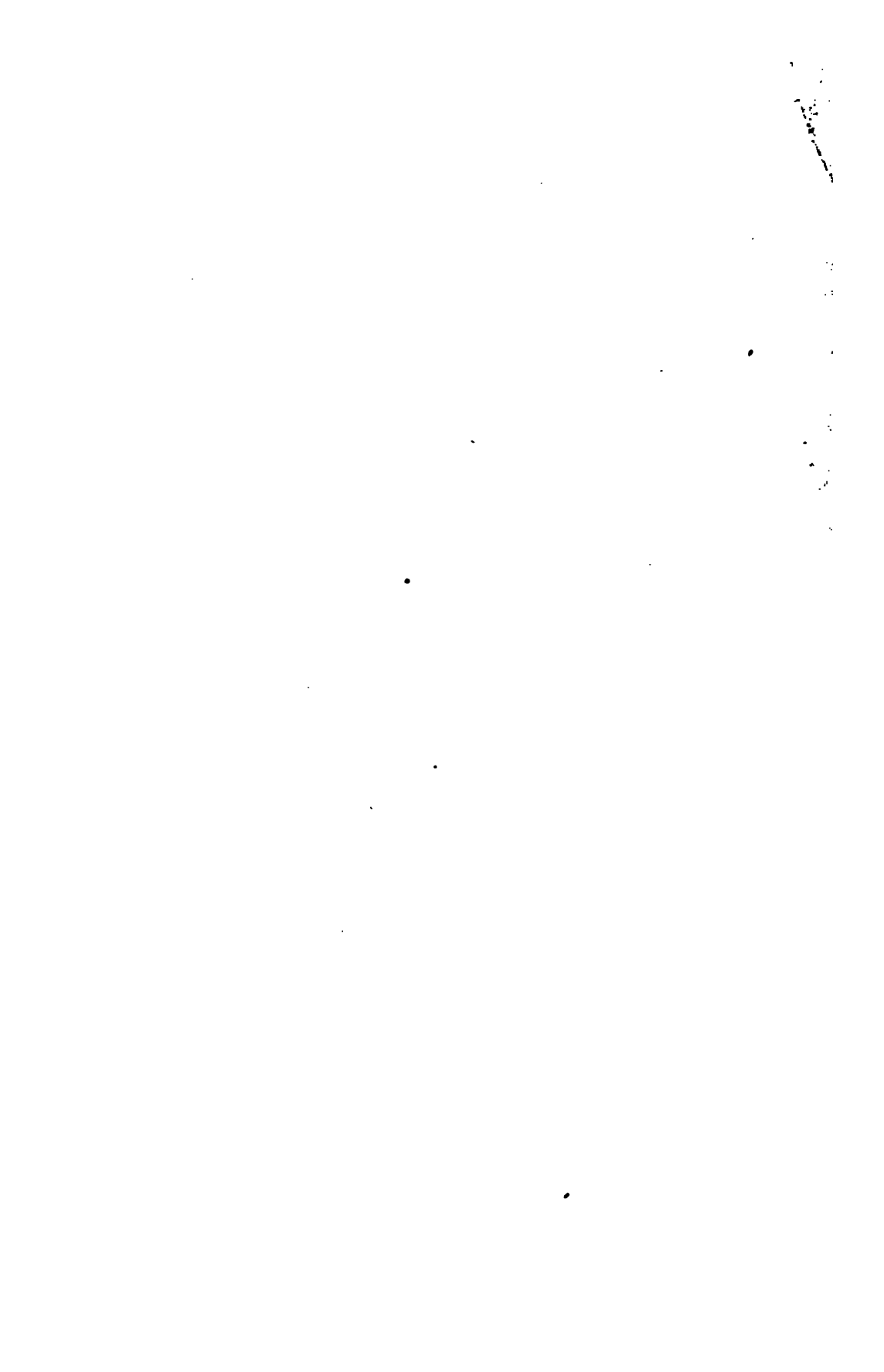
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

IN

MICHAELMAS, HILARY, AND EASTER
TERMS,

IN THE FIFTH YEAR OF WILL. IV.



BY

SANDFORD NEVILE, Esq. OF THE INNER TEMPLE,

AND

WILLIAM M. MANNING, Esq. OF LINCOLN'S INN,

BARRISTERS AT LAW.



VOL. IV.



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J U D G E S
OF THE
C O U R T O F K I N G ' S B E N C H ,

During the period comprised in this volume.

THOMAS LORD DENMAN, C. J.

Sir JOSEPH LITTLEDALE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

Sir JOHN WILLIAMS, Knt.

Sir JOHN TAYLOR COLERIDGE, Knt.

N. B. LITTLEDALE, J., sat in the Bail Court
in Michaelmas Term; **PATTESON, J.,** in
Hilary Term; and **WILLIAMS, J.,** in
Easter Term.

ATTORNEYS-GENERAL.

Sir JOHN CAMPBELL, Knt.

Sir FREDERICK POLLOCK, Knt.

SOLICITORS-GENERAL

Sir ROBERT MOUNSEY ROLFE, Knt.

Sir WILLIAM WEBB FOLLETT, Knt.

A

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

RICHARD PADDON *v.* CHRISTOPHER BARTLETT and
STEPHEN LAKEMAN.

1834.

DEBT for rent for twenty years, ending 2d February, 1833, at 80*l.* a year, under an indenture of 2d February, 1812, whereby the plaintiff demised certain premises to the defendants, for the term of twenty-one years. Pleas: first, non est factum; secondly, that no part of the rent mentioned in the declaration accrued within six years; thirdly, as to 1420*l.*, part of the rent for the space of seven-teen years and three quarters, ending 2d February, 1833; that the plaintiff by indentures of lease and release, dated 29th and 30th June, 1815, assigned all his estate and interest in the demised premises to *Michael Bartlett* and *John Browne Smith*; and that no part of the 1420*l.* became due from the defendants to the plaintiff at any time before the day and year last aforesaid. Replication to the second plea, *actio accrevit infra sex annos*; to the third,

A mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble, requires only a stamp of such an amount as will cover the principal sum. *Semble.*

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v.

BARTLETT
and another.

non est factum. At the trial before Lord *Denman*, C. J., at the last Devon assizes, the defendant offered to produce, in support of the third plea, indentures of lease and release, dated 29th and 30th June, 1815, by which the premises were conveyed to *M. Bartlett* and *Smith*, in trust to secure the repayment of 1137*l.*, after payment of the costs of the trustees, and also a *reasonable sum by way of satisfaction for their trouble*. The release was stamped upon the first skin with a 5*l.* stamp, and upon each succeeding skin with a 1*l.* stamp. It was admitted that the 5*l.* stamp was sufficient for the mortgage money, but it was objected, that as the deed was to be a security for an unlimited satisfaction to the trustees, for their trouble, it should have been stamped with a stamp of 20*l.*, according to the provisions of the stat. 48 *Geo.* 3, c. 149. The Lord Chief Justice was of opinion that the deed was properly stamped, and admitted it. A verdict was found for the defendants, on the issues raised by the third plea, but leave was given to the plaintiff to move to enter a verdict on those issues.

Newman now moved for a new trial accordingly. The mortgage deed was not admissible in evidence. In *Dickson v. Cass* (a), a bond was given in the penal sum of 2000*l.*, and the condition of it, after reciting that the defendant and another person had opened an account with certain bankers, who had agreed to discount bills and pay in advance for them any sum not exceeding 1000*l.*, was declared to be for payment to the bankers of all such sums as they should advance on account of the accepting or paying any bills, together with such lawful charges and allowances for advancing and paying such bills as are usually paid to bankers. The Court held, that this being a bond not only to secure 1000*l.*, but also a further sum for the banker's charges for commission, the stamp of 5*l.* required by the 55 *Geo.* 3, c. 184, Sched. part 1, tit. "Bond given to secure a sum exceeding 500*l.* but not exceeding 1000*l.*," was not suffi-

(a) 1 Barnw. & Adol. 343.

cient. In this case, besides the mortgage money, an additional sum, by way of compensation to the trustees, is secured, and therefore, according to *Dickson v. Cass*, the deed required another stamp for that further sum. [*Patterson, J.* In *Dickson v. Cass*, the stamp was barely sufficient to cover the 1000*l.*] The objection is, that the compensation to the trustees is *unlimited*, and therefore that a 20*l.* stamp was necessary.

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PADDON
v.
BARTLETT
and another.

LORD DENMAN, C. J.—I believe we are all agreed that there is nothing in the objection as to the insufficiency of the stamp. It should be shewn clearly that the stamp is insufficient.

TAUNTON, J., PATTESON, J. and WILLIAMS, J., concurred.

Rule refused.


BROOKES v. RIGBY.

THE plaintiff arrested the defendant for 25*l.* for goods sold and delivered. The defendant paid 11*l.* into Court, and pleaded the plea given by Rule 17, Hil. Term, 4 Will. 4(a), viz. that the plaintiff had not sustained damages greater than the said sum of 11*l.* The plaintiff took out of Court the 11*l.*, and proceeded to tax his costs. The proceedings were stayed during the vacation by an order of a judge at chambers, for the purpose of giving the defendant an opportunity of making an application to this Court.

Where a defendant, arrested for 25*l.*, pleads that the plaintiff is entitled only to 11*l.*, which he pays into Court under the rules of E. T. 1834, Reg. 17, and the plaintiff accepts that sum, the defendant cannot have his costs under 43 Geo. 3, c. 46, sec. 3.

Barstow now moved for a rule calling upon the plaintiff to shew cause why the defendant should not, under the statute 43 Geo. 3, cap. 46, sec. 3, be allowed his costs to be taxed by the master. The defendant is entitled to his costs. It is admitted that, before the late rules, if the

(a) *Ante*, vol. iii, 6.

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 v.
 RIGBY.

defendant had paid money into Court upon the common rule then in force, and the plaintiff had accepted the money, the defendant would not have been entitled to his costs under 43 *Geo. 3*, cap. 46 (a). But that proceeded on the ground that where the plaintiff received less than the amount of the arrest—by rule of Court—he did not come within the words of the statute (b), which gives the defendant his costs only where the plaintiff “*recovers*” less than the amount for which the defendant was arrested. The plaintiff in the present case does *recover* less, as by the replication to the plea he admits that 11*l.* is the sum due. The plea raises a distinct issue, raised upon the record as to the amount of the plaintiff’s demand, and this was no doubt the object which the legislature had in view. The Court certainly cannot be asked to look at the report of the commissioners for the purpose of construing the act; but they may be referred to it as containing the opinions of eminent professional persons as to what *would* be the *effect* of such an alteration of the law as was subsequently introduced by the statute (c).

(a) See *Rouvery v. Alefson*, 13 East, 90; Tidd, 9th ed., 984; 2 D. & R. 266; 2 B. & C. 711; 4 D. & R. 186; 5 D. & R. 383.

(b) Sec. 3 enacts, that in all actions to be brought in England or Ireland, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs *shall not recover* the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit to be taxed according to the custom of the Court in which such action shall have been brought; provided &c.

(c) The following is an extract

from the Report of the Common Law Commissioners, referred to in the argument: “By the recent practice, when money was paid into Court, a rule of Court for that purpose was obtained, and the sum paid in is considered as struck out; by the pleadings, however, the whole of the plaintiff’s case is denied, in the same manner as if no such payment were made. The denial so pleaded is intended to operate only as a denial of the *rest* of the case; and the plea used is the general issue in actions of assumpsit and debt on simple contract, and of payment or accord and satisfaction, in debt or covenant on specialties. It is much more convenient, as well as more consistent with

LORD DENMAN, C. J.—It has been held that payment of money into Court by the defendant, and acceptance of it by the plaintiff, ousted the defendant of his claim for costs under the 43 Geo. 3; and I think there is no ground for holding that this does not apply to cases occurring since the making of the new rules.

1834.
BROOKES
v.
RIGBY.

TAUNTON, J.—The plaintiff does not *recover* the sum paid into Court; he has *judgment* for the costs only. His position is therefore the same as before the late rules. I cannot see the distinction pointed out by Mr. *Burstow*.

PATTESON, J.—The reason why the defendant did not formerly recover his costs under the statute where the plaintiff accepted the money paid into Court, was, that he had previously *agreed* by the rule to pay them. The plaintiff now only obtains by the record what he formerly did by rule of Court.

WILLIAMS, J. concurred.

Rule refused.

the real state of facts, that payment of money into Court should be put into the shape of a plea. Other advantages are gained by putting it into the shape of a plea, namely, that the expense of a rule of Court, and of proving such rule

at the trial, is avoided; and that a specific issue will arise as to the sufficiency of the sum, and the admission of the plaintiff's right of action and extent of the admission, will appear on the record."

In the matter of Arbitration between JOHN BRIDGE and
ROBERT WRIGHT.

IN the course of the argument in this case, *Taunton, J.* said, that a few terms ago it had been resolved by all the judges, that a single judge at chambers has *power* to give costs upon a summons; but that they had also at the same time resolved not to *exercise* this power in any but *extreme* cases.

A judge at chambers has power to give costs upon a summons; but this power will only be exercised in extreme cases.

1834.

The KING v. MILLS.

The Court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon the coroner's inquest with manslaughter, without an affidavit of what took place before the coroner.

ALEXANDER moved for a rule to shew cause why a certiorari should not issue to remove the depositions taken in this case before a coroner of the West Riding of Yorkshire, and also why the defendant should not be permitted to put in bail before a justice of the peace of the county of York. It appeared from an affidavit made by the defendant, that he was a boy of about 14 years of age, and was at present in custody in York Castle, charged with manslaughter, upon the verdict of a coroner's jury, and that he had surrendered himself the moment he was aware the verdict had been given; that on the 5th of November he was in company with several other boys of his own age, and while they were amusing themselves together, the deceased ran after him, and while so running fell down; that the fall of the deceased, which was the occasion of his death, had not been caused by the defendant, who was merely running away to escape punishment. [Lord *Denman*, C. J. Is there any affidavit of what took place at the coroner's inquest?] No; but the depositions taken by the coroner will, of course, be produced to the Court if the rule be granted, and the necessity for such an affidavit is therefore obviated.

LORD DENMAN, C. J.—The Court cannot grant the rule upon the present affidavit. We are bound to suppose that proper evidence has been given before the coroner's jury, and that they have found a verdict on premises sufficient to warrant the conclusion at which they have arrived.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule refused.

The application was afterwards, in the same term, re-

newed upon affidavits stating what was proved before the coroner's jury, from which it appeared that the manslaughter was of a venial description. The Court granted the rule, and, in consideration of the near approach of the vacation, gave permission that the depositions should be submitted (when returned) to a judge at chambers.

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The KING
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Ex parte JOHN LAW, in the matter of JOSEPH WOOD, deceased.

WIGHTMAN, in last Trinity term, obtained a rule calling upon *Mary Wood* to shew cause why a writ in the nature of a writ of prohibition, should not issue to the judge of the Prerogative Court of Canterbury, commanding him to stay all further proceedings against *John Law*, in the matter of *Joseph Wood* deceased, until his lien on the will of the said *Joseph Wood* should have been satisfied and discharged. This rule was obtained upon the affidavit of *Law*, in which he stated that he was an attorney of this Court, and had been employed as the attorney of the deceased, who, at the time of his death, was indebted to him in a considerable amount upon the balance of accounts for business done; that a part of this amount was for preparing the will in question, which the deceased had, upon its execution, deposited with him; that upon application from *Mary Wood*, the widow of the deceased, he had given her a copy of the will, but had refused to deliver up the will itself, until his lien on it should have been satisfied; that the debt due to him had not been paid, and that he had been served with a citation from the Prerogative Court, requiring him to bring the will into the registry, and leave it there, and adding, on information and belief, that the Prerogative Court would decree him to give up the possession without satisfaction of his lien.

Quære, whether the Court would grant a prohibition if it should appear that the Prerogative Court had actually refused to recognize the lien.

Semble, that a prohibition would not be granted.

The Court refused to issue a writ of prohibition to the Prerogative Court, inhibiting them from proceeding further against an attorney, in the matter of a party deceased, until his lien upon the will of such deceased party should have been satisfied,—upon affidavits, shewing that the attorney who had the will in his possession had a common law lien upon it, which the parties interested had refused to discharge, and stating that

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tive Court of Canterbury at her instance, requiring him, under pain of the law and contempt thereof, on the sixth day of the service of the said citation on him, to appear in the Prerogative Court, and to bring into and leave in the registry of that Court, the original will of the said *Joseph Wood*, deceased; that he had been advised and believed, that, by the common law, he has a lien upon the will, and would not, by the course of the common law, be compelled to part with the possession thereof without payment of such lien; but that he was informed that the Prerogative Court would decree him to give up the will without payment of his bill of costs against the deceased.

Follett now shewed cause. The Prerogative Court has exclusive jurisdiction over matters of probate, and therefore this Court cannot issue a prohibition to prevent them from proceeding according to their own course in enforcing the production of a will. A prohibition cannot issue unless the inferior Court is proceeding in a matter over which they have no jurisdiction. If, in the Prerogative Court, a question of legal lien should arise, and they should proceed upon it, then this Court may interfere. But the Prerogative Court has now done nothing which it has not power to do. They have a right to call upon a party who is in possession of the will of a deceased person to produce it. It is a matter strictly within their jurisdiction, and exclusively so.

Wightman in support of the rule. Undoubtedly the Prerogative Court has exclusive jurisdiction over matters of probate; but if that or any other inferior Court proceeds in derogation of any common law rights, this Court may interfere by prohibition. The Prerogative Court is entitled to call for the will, but not in such a way as to interfere with a common law right in the party in whose possession it is. If Mr. *Law* is obliged to obey the citation, his lien will be entirely gone; for by the terms

of that citation, as well as by the common course of that Court, the will is not only to be *brought into*, but also *left* in the registry. [Taunton, J. Can you furnish us with any case in which the ordinary process of other Courts has been intercepted by a lien?] There does not appear to have been any such decision, and indeed this is a case which very probably may not have occurred before (a). The applicant rests his case entirely upon the principle, that if an inferior jurisdiction, though proceeding in a matter which is within its jurisdiction, refuses to recognize a right given by common law, this Court will grant a prohibition to restrain them from proceeding, unless the common law right be first allowed.

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LORD DENMAN, C. J.—The Prerogative Court has exclusive jurisdiction over wills, and we cannot presume that when this will is in their possession they will do wrong. It should be shewn by a direct authority that we have power to issue a prohibition for the purpose of giving effect to a lien against the rights of all the legatees. No such authority being produced, we cannot interfere.

TAUNTON, J.—There is no ground for making this rule absolute. It is assumed that the Court below is going to act in derogation of the common law. I do not see that they are at all acting in derogation of the common law. They have jurisdiction, and have it *exclusively* over matters of *probate*; and all that they have done is only a proceeding within their jurisdiction. It is not because it is thrown out that they are *about* to proceed wrongly, that is, in a manner different from that in which a Court of Common Law would proceed, that we can interfere. I do not know but that after the will is in the registry, it may, for the

(a) In *Twibill's* case, (1 Wms. Saund. 67, 2 Keble, 346, 1 Siderf. 362, S. C.,) it appears that the course of practice in K. B. is postponed to the privilege (or quasi lien) of foreign attachment.

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purpose of lien, still be considered as in the same possession.

WILLIAMS, J.—I entirely concur. The registry is the proper place for the custody of the will, and the Ecclesiastical Court has jurisdiction over matters relating to wills. It is too much to say that we can, by reason merely of a *supposition* that the Court below will act in derogation of the common law, interfere by prohibition to prevent that Court from proceeding according to its usual course.

Rule discharged.

DOE, on the demise of ROBERT WHEELER, v. ARTHUR WHEELER.

A feoffment, in consideration of natural affection, and also of 10s., does not, under 55 Geo. 3, c. 184, require two separate stamps of 1l. 15s. each.

AT the trial of this ejectment before Lord *Denman*, C. J., at the last Dorsetshire assizes, a title was shewn in the lessee of the plaintiff, by descent from his father. The defendant, a younger brother, then offered in evidence a feoffment, whereby the father, in consideration of natural love and affection, and of ten shillings, conveyed to him the land in question. This feoffment had originally been stamped with a 1l. stamp only, but had, before the trial, been impressed with an additional (a) stamp of 1l. 15s. upon payment of the usual penalty. It was objected that the feoffment was insufficiently stamped, in not having *two* stamps of 1l. 15s. each, and ought not therefore to be received in evidence. The lord chief justice was, however, of opinion that the stamp was sufficient, and admitted the deed. The defendant in consequence had a verdict; but

(a) The 1l. 15s. stamp appears to have been *added* to the original 1l. stamp, because the commissioners have no power of *substituting* a 1l. 15s. for a 1l. stamp.

If then a 1l. 15s. stamp had been affixed in the first instance, no further stamp would have been required, unless the deed exceeded 1080 words.

leave was given to the lessor of the plaintiff to move to set it aside, and enter a verdict for the plaintiff.

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Butt now moved accordingly, and contended, that as the single deed of feoffment embodied the united effects of a lease and release(*a*), it was within the intention of the Stamp Act (55 *Geo.* 3, c. 184,) liable to the same amount of duty as would have been required if the conveyance had been by way of lease and release; and he further contended, that upon a lease and release, the consideration expressed in which was a mere nominal consideration, a stamp of 1*l.* 15*s.* upon each instrument would by the schedule of the Stamp Act have been required.

LORD DENMAN, C. J.—I am of opinion that the feoffment is *not* chargeable with the further stamp of 1*l.* 15*s.*, and that, therefore, there must be no rule.

TAUNTON, J., PATTESON, J., and WILLIAMS, J. concurred.

Rule refused.

(*a*) This argument would probably have been considered as entitled to some weight, if a conveyance by feoffment had been a *modern* contrivance, introduced to supersede the circuitous process of changing the legal possession by

an execution of the use created by a fictitious bargain and sale inserted in one instrument for the purpose of qualifying the purchaser to acquire the fee by a release *pur enlarger l'estate*, to be contained in another.



HARGREAVES v. HUTCHINSON.

TROVER for malt. Plea: the general issue. At the trial before Lord *Lyndhurst*, C. B., at the last Yorkshire
 for ready money, malt, which he immediately re-sells to *B.* at an advanced price, payable in bills, the malt to be held by *A.* as a security. *B.* demands the malt without paying the bills: Held, that *B.* may recover in trover the full value of the malt, without deduction or recouper of the money received by him upon the simulated sale.

As a cloak for a usurious loan, *A.* purchases of *B.*

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assizes, it appeared that this action was brought to recover the value of 146 quarters of malt, which had come to the possession of the defendant under the following circumstances. In April, 1833, the plaintiff applied to the defendant for a loan of 300*l.*, which the defendant refused; but he agreed to purchase, and did accordingly purchase 146 quarters of malt from the plaintiff at 40*s.* per quarter, and immediately paid the amount, namely, 292*l.*, to the plaintiff. In the course of the same day the defendant agreed to re-sell the malt to the plaintiff at 43*s.* per quarter, subject to a stipulation that two bills of exchange then given by the plaintiff, as part of the latter purchase money, should be duly honoured at maturity. The malt was taken into the possession of the defendant, and the two bills having been dishonoured, he refused to return it to the plaintiff, who therefore brought this action to recover its value, which was then estimated at 62*s.* per quarter. Evidence was given which tended to shew that the two contracts of sale and re-sale were contemporaneous, and intended to cover an ~~usurious~~ loan; and upon this the lord chief baron left the question to the jury, whether this was an usurious contract. The jury found that question in the affirmative, and a verdict was entered for the plaintiff for 450*l.*, the value of the malt, at 62*s.* per quarter.

Alexander now moved for a rule nisi to reduce the damages, by deducting from the amount of the verdict the sum of 292*l.* actually paid by the defendant to the plaintiff on purchasing the malt. He rested his application chiefly on the manifest injustice that would be committed if the plaintiff were allowed to pocket the amount of the damages, after having received a large proportion of what those damages were obviously intended to cover; but he admitted that he could find no case which went the length of the present application. He also pressed, as an additional reason for the interference of the Court, the difficulty under which the

defendant might be placed in maintaining an action to recover back the £92*l.* as money had and received by the plaintiff to his use, and suggested that *Fitzroy v. Gwillim* (a), if not directly overruled, had long ceased to be regarded as law. [*Patteson*, J. The contract, according to the evidence, was void. Is there not a case very similar to this in the early part of Burrow's Reports (b)?]

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By the Court—

Rule refused (c).

(a) 1 T. R. 153.

(b) *Quære*.

(c) *Possessionem alienam perperam occupantibus, compensatio non datur*.—Cod. lib. 4, tit. 31, l. 14, s. 2.

Where, however, in an action for a tort, it appears that some benefit has resulted to the plaintiff from a payment made, or some other act *bonâ fide* done by the tort-feasor with reference to that which forms the subject-matter of the tort, the amount will be *recouped* (i. e. *cut off* or deducted) from the damages awarded to the plaintiff. Thus where a disseisor pays the arrears of the rent charge issuing out of the land, and the disseisee recovers in assize, the payment shall be recouped from the damages. Dict. per Curiam, *Anon.* Dyer, 2 b. The same point had been decided 8 Ass. fo. 20, pl. 37, and again in the following year, T. 9 E. 3, fo. 8, pl. 21, to prevent circuity of action. And the course was to give judgment for the full damages, and at the same time to award that the payment

should be recouped from the amount, 3 H. 6, Bro. Abr. *recouper*.

Damages, pl. 9. But unless the matter of recouper be expressly found by the jury, it seems that the deduction cannot be made, *ib.* So, where the heir

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brought assize against an abator, who had endowed the wife of the ancestor, the plaintiff had judgment to recover two-third parts of the land and his damages, the widow to retain one-third part, and a third part of the damages to be recouped, 12 Ass. fo. 35, pl. 20. In assize, the plaintiff recovered the land without damages,

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because the land was amended by building, and this was found by the jury, 14 Ass. fo. 41, pl. 12; T. 14 E. 3, Fitz. *Damages*, pl. 92, *semble* S. C. Damages in assize were recouped in respect of *emblements*, (as to which, *vide ante*, ii. 725, 734, n.) T. 24 E. 3, fo. 50, pl. 35. If tenant by elegit commit

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waste, the value of the waste shall be recouped from the debt, upon a *venire facias ad computandum*, &c. *semble*, F. N. B. 58, H.

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The vendor of spirits in small quantities, for the price of which he is disabled from recovering by 24 Geo. 2, c. 40, s. 12, who has another demand against the vendee, may apply a payment made to him by his debtor to the price of the spirits, unless at the time of payment the debtor direct a different appropriation of it.

In the absence of such contemporaneous directions by the debtor, the creditor may so apply the payment at any time afterwards.

And a jury may, upon the trial of an action brought by such creditor against the debtor, find that such appropriation has been made, although in the particulars of demand the plaintiff has stated that the action was brought to recover the amount of his bill, being the whole of his original demand, including the charges for spirits.

ASSUMPSIT for goods sold and delivered. Plea: first, non assumpsit; secondly, the statute 24 Geo. 2, c. 40, s. 12(a). The particulars of the plaintiff's demand stated, that the action was brought to recover the amount of a bill delivered for 39*l.*, which bill contained items to the amount of 11*l.* 8*s.*, for spirits supplied in small quantities. At the trial before the deputy of the sheriff of Middlesex, it appeared as follows:—The whole of the original claim, including the 11*l.* 8*s.* for spirits, amounted to 34*l.* 4*s.* 6*d.* The defendant had paid on account the sum of 17*l.*; and at the time of the payment nothing was said either by the plaintiff or the defendant as to the mode in which this payment should be appropriated, nor was there any evidence of an appropriation of this payment to a particular part of the bill at any time before action brought; but it was now contended, for the plaintiff, that the payment to the extent of 11*l.* 8*s.* should be applied in satisfaction of the claim for spirits; and for the defendant, that the payment could not at that stage be appropriated to items in respect of which the plaintiff found that he was not legally entitled to recover, and that the action could only be maintained for the sum of 5*l.* 16*s.* 6*d.*, being the residue of the 34*l.* 4*s.* 6*d.*, after deducting the several sums of 17*l.* and 11*l.* 8*s.* The jury,

(a) Which enacts, "that no person shall be entitled to maintain any action or suit to recover, either at law or in equity, any sum or sums of money, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and bona fide contracted at one time to the amount of 20*s.* or upwards; nor shall any particular article or item in any account or

demand for distilled spirituous liquors be allowed or maintained where the liquors delivered at one time, and mentioned in such article or items, shall not amount to the full value of 20*s.* at the least." As to this enactment see *Scott v. Gillmore*, 3 Taunt. 226; *Jackson v. Attrill*, Peake, N. P. 180; *Dawson v. Remnant*, 6 Esp. N. P. C. 24; *Spencer v. Smith*, 3 Campb. 10.

under the direction of the under-sheriff, found a verdict for the plaintiff, damages 17*l.* 4*s.* 6*d.*, and said that the plaintiff had applied the money paid on account to the extent of 11*l.* 8*s.* to the claim for spirits.

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Mansel now moved for a new trial, or to reduce the damages, pursuant to leave reserved. There was no evidence of an appropriation of the sum of 17*l.* before action commenced; but, on the contrary, the plaintiff has, by his particulars of demand, claimed the whole amount of his bill, including the illegal items; and has merely given credit upon the trial for the 17*l.*, which shews that he had not appropriated it to any particular items in his bill. Therefore the Court cannot say but that the action is brought to recover a balance of 17*l.* 4*s.* 6*d.*, the greater part of which is for goods illegally supplied, and the price of which he is by law prevented from recovering. The statute of 24 *Geo.* 2, c. 40, s. 12, ought to be construed strictly. The plaintiff should, in his particulars of demand, have elected to appropriate a portion of the payment to the illegal part of his demand, and not having done so, he cannot now recover for any thing more than the balance of 17*l.* 4*s.* 6*d.*, reduced by 11*l.* 8*s.*, which balance is 5*l.* 16*s.* 6*d.* only.

Lord DENMAN, C. J.—If the action had been brought for the 11*l.* 8*s.* alone, the statute would have prevented the party from recovering. But that is not the case here. The action is brought upon the balance of an account which certainly contains items to that amount, in respect of which the party could not recover; and the question is, whether money having been paid on account, and no specific appropriation having been made at the time of payment, the jury are not entitled to say that the payment to the extent of the 11*l.* 8*s.* has been appropriated by the plaintiff to those items, to recover which he cannot obtain the aid of the law. I see no reason whatever why they should not so find.

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TAUNTON, J.—I think that there should be no rule. The 24 *Geo. 2*, has been relied upon to shew that a part of the demand—in respect of spirits sold and delivered in smaller quantities than to the amount of 20s. at one time—could not be recovered. The plaintiff has *not* recovered in respect of the spirits, for I consider that they have been excluded out of the verdict. If a man pays money to his creditor, and does not at the time state *how* he will have it applied, the *creditor* has a right to make the appropriation. Here 17*l.* was paid by the defendant *generally*, without making any application of it; he did not say, I pay this sum for the first items which come to that amount. The plaintiff, therefore, had the right to make the application; and he had a right to make it *at any time before the matter came to the consideration of the jury*. Here, he does so. He must be considered as having said “I choose to apply 11*l.* 8s. out of the 17*l.* to payment for the spirits which I cannot by law recover.” The plaintiff, therefore, *has been paid* the 11*l.* 8s. which, by his bill, he claimed in respect of the spirits; and therefore the action was not maintained for that part; and therefore it is not within the statute. There is no provision in the act forbidding *the application of a payment* to a demand of this sort.

WILLIAMS, J.—I am of the same opinion. The defendant has disarmed himself of the right to take advantage of the statute, by *paying* that part of the demand which the statute would have prevented the plaintiff from recovering.

Rule refused. (a)

(a) *A.* being indebted to *B.* on bond (or mortgage), and also for goods sold and delivered, money paid by *A.* *generally* on account, shall be taken to have been paid towards discharge of the bond (or mortgage), because it carries interest, 2 Brownl. 107; *Heyward v. Lomas*,

1 Vern. 24; *Anon.* 12 Mod. 559.

A. and *B.* are indebted by bond to *C.*, to whom *B.* is also indebted on simple contract. An account is stated between *B.* and *C.* embracing *both* debts; and *B.* makes a bill of sale to *C.* towards satisfaction of the *whole* debt. The

money arising from the bill of sale shall be considered as paid on the footing of the preceding account, and applied towards discharge of both debts in proportion, *Perry* or *Perris v. Roberts*, 1 Vern. 34, 2 Chan. Cas. 84; *Styart v. Rowland*, 1 Shower, 216. And see *Hall v. Wood*, 14 East, 243, n. (a);

Goddard v. Cox, 2 Stra. 1194; *Peters v. Anderson*, 5 Taunt. 596, and 1 Marsh. 238; *Kirby v. Duke of Marlborough*, 2 Maule & Sel. 18; *Bodenham v. Purchas*, 2 Barn. & Ald. 39; *Simson v. Ingham*, 3 Dowl. & Ryl. 249, 252, and 2 Barn. & Cressw. 65; *Biggs v. Dwight*, 1 Mann. & Ryl. 309.

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BOWLER, Gent. one &c. v. BROWN.

ASSUMPSIT for work and labour, &c. as an attorney, in prosecuting and defending suits, &c. Plea: the general issue. At the trial before Lord *Denman*, C. J., at the Middlesex sittings after Hilary term, 1834, it appeared that the plaintiff's certificate for the year 1830-1 having expired in November, 1831, he had neglected to take out the certificate for the year ending on the 15th November, 1832, until the 13th or 14th of that month. This action was brought to recover the amount of a bill for business done, as an attorney, in August, 1832. It was objected, on the part of the defendant, that as the plaintiff was, at the time of the business done, acting without a certificate, he was incapable of maintaining this action. His lordship overruled this objection, and left the case to the jury, who found for the plaintiff. In last Easter term *Currington* (pursuant to leave reserved) obtained a rule nisi for a nonsuit or new trial; against which

An attorney may maintain an action for business done at a time when he was uncertificated, provided a certificate be taken out by him before the end of a year after the expiration of the period to which the preceding certificate extended.

Petersdorff now shewed cause. The question raised by this motion is, whether it is necessary that a practising attorney should take out a new certificate at the very instant on which the former one expires—or whether a certificate, taken out at any time within a year from that period, is to have a retrospective effect, so as to enable the attorney to sue for his fees in respect of business done in

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the interim. The answer to this question depends entirely upon the acts; and in construing these acts, it is necessary to bear in mind a fact which appears upon the face of them,—that the penalties and incapacities imposed in case of non-compliance with their provisions are imposed with a view solely to the increase of the *revenue*, and not with any view to the benefit of the *public*. The first enactment which imposes upon attorneys the necessity of taking out an annual certificate is the 25 *Geo.* 3, c. 80, s. 7 (a), which is essentially the same as the late enactment of 37 *Geo.* 3, c. 90, s. 30 (b),—upon which, together with the 31st

(a) By which, “to prevent evasion in the payment of the higher duties imposed by this act by solicitors, attorneys, notaries, proctors, agents, and procurators, who may have divers places of residence at the same time, within the limits of the different districts above mentioned,” it is declared and enacted, “That if any solicitor, &c. liable to any of the rates or duties hereby imposed on certificates, shall reside in any of the inns of court, or in the cities of London or Westminster, or the borough of Southwark, the parish of St. Pancras or St. Mary le Bone, or within the bills of mortality, or within the city of Edinburgh, for the space of forty days or more in any one year, every such solicitor &c. shall be deemed to be resident within the limits last mentioned, within the true intent and meaning of this act, and shall be liable to the higher duties by this act imposed on certificates, for and during such time as he shall continue to be so resident for the space of forty days or more in each year, notwithstanding such solicitor, &c. shall or may, at other

times in each such year, reside elsewhere without the limits last aforesaid.”

(b) “That if any person shall, in his own name or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings in any of the courts aforesaid, for or in expectation of any gain, fee or reward, or shall do any act in any of the said courts as an attorney, solicitor, notary, proctor, agent or procurator of such court, without obtaining a certificate in the manner hereinbefore directed, or without entering the same in one of the courts aforesaid, wherein such person shall be admitted, enrolled, sworn or registered as solicitor, attorney, &c., or shall deliver it to any person at the said head office, any account containing a place of residence as the place of his residence, contrary to the directions of the said act (25 *Geo.* 3, c. 80), *with intent to evade* the payment of the higher duties of 5*l.* by the said act imposed, every such person shall for every such offence

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section (a), the question turns. Upon this latter act it is admitted that if an attorney neglects *for a whole year* to take out his certificate, he cannot sue in respect of business done as an attorney during that year; but it is submitted that a certificate taken out *within* the year has a retrospective effect, so as to enable him to sue in respect of business done in the interval. If the Court were to hold, upon the 30th section, that an attorney who neglected during a *portion* of a year to take out his certificate, is to be punished for such neglect in the manner contended for, and the Court were yet, under the 31st section, to continue to re-admit, upon payment merely of a *nominal* penalty, attorneys who had neglected to take out their certificate for *more* than a year, there would be a monstrous incongruity. [Taunton, J. That only goes to shew that the Court, in the exercise of its discretion, ought to impose a heavier fine upon re-admission. But it is not the fact that the penalty imposed is merely *nominal*; at least not in cases in which the attorney has practised in the interim without a certificate; for it is then (b)

forfeit and pay the sum of 50*l.*, and shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity, for the recovering any fee, reward or disbursement, on account of prosecuting, carrying on or defending any action, suit or proceeding, or having prosecuted, carried on or defended any action, suit or proceeding, or any matter or thing relating thereto, without such certificate."

(a) "That every person admitted, &c. in any of the courts as aforesaid, who shall neglect to obtain his certificate thereof in the manner before directed, for the space of *one whole year*, shall from *thenceforth* be incapable of practising in his own name or in the name of any other person in any

of the said courts, by virtue of such admission, entry, enrolment, or register; and the admission, &c.. of such person in any of the said courts shall be from thenceforth null and void: Provided always, that nothing hereinbefore contained shall be construed to prevent any of the said courts from re-admitting any such person on payment to the said commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money by way of penalty as the said court shall think fit to order and direct."

(b) Where the attorney had reason to believe that his certificate had been taken out, the Court imposes a nominal fine, in addition to the arrears.

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frequently heavy. Lord *Denman*, C. J. It is only upon an *intention to evade the duty* being shewn that the penalty attaches. Mr. *Carrington*, is not that conclusive against you? I was not desired to put the *intent* to the jury.]

Carrington, contra. It is submitted that ss. 13 and 14 of the 54th *Geo. 3*, c. 144, are conclusive to shew that this action cannot be maintained. By the 13th section it was enacted, that all attorneys, &c. (who would, according to the laws then in force, be bound to take out a certificate annually between the 1st November and the last day of Michaelmas term,) should thereafter take out such certificate between the 15th November and the 16th December in each year. By the 14th section it was enacted, that all certificates to be taken out between the 15th November and the 16th December should be dated on the 16th November, and that all certificates which should be taken out by any such persons at any other time should be *dated on the day on which the same should be granted*, and that all such certificates respectively should *have effect and continue in force from the day of the date thereof* until the 15th November following, both inclusive, and no longer. The latter words of the 14th section seem expressly intended to prevent a certificate, taken out after the 16th December, from taking effect from the 15th November preceding. [*Patteson*, J. It may be admitted that until the certificate is taken out, the party is uncertificated; but it is only the wilful *uncertificatedness* which, under the 30th section of 37 *Geo. 3*, disables an attorney from suing.] The words, "with intent to evade the higher duties," do not apply to the *disabling* part of the section. That part of the section says only that an attorney shall not sue for fees for business done in relation to any action "*without such certificate as aforesaid.*" [Lord *Denman*, C. J. That argument will not hold good. It may perhaps be a question whether the words, "with intent to evade the *higher* duties of 5*l.* by the said act imposed," do not refer to the delivering an "account con-

taining a place of residence as the place of his residence, contrary to the directions of the act 25 Geo. 3." *Patterson, J.* By the 1st section of 25 Geo. 3, c. 80, stamp duties are to be charged upon the certificates of attorneys, of different amounts, according as the place of residence of such attorneys shall be within the metropolis or in other parts. As attorneys residing in London are liable to be charged with *higher* duties, the words in the 30th section, which have been referred to, may *perhaps* have been intended to apply only to what is said as to giving an incorrect statement of the place of residence. Lord *Denman, C. J.* As the words come after both the omissions which by this clause are made penal, that which precedes ought, I think, to be limited by them, notwithstanding the doubt which is created by the use of the word "*higher*." *Taunton, J.* The statute is quite penal enough, however limited the construction put upon it may be.]

Lord DENMAN, C. J.—This rule must be discharged. It is certainly *possible* that the legislature may have intended to use these words, "with intent to evade the *higher* duty," with reference only to that kind of omission on the part of an attorney which falls within the former act of parliament, which makes the higher duty to depend upon certain facts, which do not come in question here; but if that was the *intention* of the legislature, they have failed to *effectuate* it. The words are not so placed in the sentence that they can be construed to be *confined* to that class of omissions only provided against by the former statute. The words are inserted in the clause, after two omissions have been mentioned, in such a manner that they must, I think, be made applicable to *both* the omissions; and therefore it is necessary, in order to bring a party making either of the omissions mentioned under the penal consequences of the act, that there should have been an *intent* to evade the payment of the duty. If a bad *motive* were not necessary to bring a party within the provision of

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the act, an attorney might be liable to a penalty of 50*l.* and to disability for not having taken out his certificate, even though it should be shewn to have arisen from the merest accident occurring to his servant or to his agent. This, I think, never could have been the intention of the act; and it is very reasonable that the provision, making it necessary to shew an *intention* to evade the duty, should be applicable to *both* the omissions which are made penal.

The 54th *Geo. 3.* makes no difference, except as to the time when the certificate is to be taken out.

TAUNTON, J.—I entirely concur in my lord's opinion; and I am very glad that the law of the case coincides with the justice of it.

PATTERSON, J. and WILLIAMS, J. concurred.

Rule discharged.

BIRCH, Administrator of VINCENT, deceased, v. DAWSON and another.

Under bequests of *fixtures* and *fixed furniture* to *A.* and of household goods, *furniture*, plate, &c. to *B.* *A.* is entitled to chimney-glasses and book-cases fastened by screws and brackets to the walls of the house as *fixed furniture*.

DETINUE for two looking-glasses and a book-case. Plea: non detinent. At the trial before *Littledale, J.* at the Middlesex sittings, the following facts were proved:

May, 1831. *George Dawson* bequeathed to *G. P. Dawson*, and *F. Bossy*, his leasehold messuage, No. 24, Brompton Square, Middlesex, with the grates, stoves, coppers, locks, bolts, keys, bells, and other *fixtures* and *fixed furniture* therein, and also the household goods, *furniture*, plate, linen, books, china, wine, and liquors, which should be therein at the time of his decease,—upon trust as to the said messuage, fixtures, and fixed furniture, to permit *E. S. Vincent* to have the use and enjoyment thereof during her life; and

Under a bequest of a leasehold house, “with the grates, stoves, coppers, locks, bolts, keys, bells, and other *fixtures* and *fixed furniture* therein,” chimney-glasses and book-cases fastened to the wall by means of brackets and screws, do not pass.

as to the household goods, furniture, plate, linen, china, books, wine, and liquors, and other properties in that measure, not being comprehended under the preceding terms "fixtures and fixed furniture,"—in trust for the said *E. S. V.*, absolutely, as her own property. At the testator's death, the looking-glasses and the book-case were in the house in Brompton Square. The looking-glasses stood upon chimney-pieces, and were slightly fastened to the wall by a nail on each side; the book-case was also slightly fixed to the wall by brackets and screws. *E. S. V.* died shortly after the testator, and in this action the chimney-glasses and book-case were claimed, as included in that part of the bequest which gave her an *absolute* property. The learned judge nonsuited the plaintiff.

G. T. White now moved for a new trial. The articles claimed passed to *E. S. Vincent* absolutely as "furniture," and not for her life only, as "fixtures, or fixed furniture." By the enumeration of grates, stoves, coppers, &c. which precedes the "other fixtures and fixed furniture," the meaning of the latter words is confined to things *ejusdem generis*, although taken alone they might bear a more extensive signification. The fixtures enumerated are fixtures which are usually fixed to the building by mortar, or are necessary for the convenient occupation of the house. The chimney-glasses and book-case do not fall within either of these descriptions. In *Lewis v. Rogers*(a), Lord *Lyndhurst*, C. B., alluding to the rule as to matters *ejusdem generis*, says, "the cases decided upon that rule are where *particular* words are used, followed by *general* words; in which the latter are held to extend only to matters *ejusdem generis*." The difficulty felt by the learned judge at the trial, arose from the use of the term "fixed furniture," in *addition* to that of "fixtures." It is submitted that they both mean the same thing. If the lease had expired, and both had been allowed to remain on the premises, both

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(a) 1 Crompt. Mee. & Rosc. 52.

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would have "become a gift in law to him in reversion," *Poole's case*(a). [Lord *Denman*, C. J. That is not the test. The question here is, what was the *intention* of the testator, as far as it can be collected from the will.] In *Beck v. Rebow*(b), it was held that hangings, chimney-glasses, or pier-glasses, are matters of ornament and *furniture*, and do not go with the house. There was, in that case, a covenant to grant all the fixtures upon the staircase, over the doors and chimney-pieces, and all things fixed to the freehold of the messuage; and although the articles in question were fixed with nails and screws to the walls, they were held to be only matters of *ornament* and *furniture*, and not within the covenant. By "fixtures and fixed furniture" all things only which were *fixed* to the freehold and *necessary* to the occupation of the house, must have been intended to be designated. There can be no distinction between "fixtures" and "fixed furniture." These articles do not come within the *meaning* of the words used, *Allen v. Allen*(c).

LORD DENMAN, C. J.—Three sorts of things being mentioned in this will—fixtures, fixed furniture, and furniture,—we must inquire what sense the *testator* meant to apply to each of these expressions. It seems to me that by "fixed furniture," the testator must have meant furniture *in itself* of a *movable* nature, but which was, in point of fact, *fixed* to the wall; and I think these articles come *precisely* within that meaning.

TAUNTON, J.—I quite agree that the glasses and book-case are not *ejusdem generis* with the things specifically enumerated. The only question is, whether they come within the meaning of the expression "fixed furniture." It is clear that the testator meant to pass something more than ordinary fixtures. The articles claimed come within the denomination of "furniture." The glasses are fastened

(a) 1 Salk. 368.

(b) 1 P. Wms. 94.

(c) Moseley's Rep. 112; and see *Amos & Ferrard on Fixtures*, 200, 201.

by a nail, and the book-case by brackets and screws. This, I think, made them *fixed*; therefore, they are "fixed furniture," and within the terms of the bequest.

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PATTESON, J.—The testator has used a new expression, and must have intended to attach some peculiar meaning to it. These things come precisely within what he must have contemplated, as far as I can judge. I think that the very words used in the will, defeat the argument on the subject of matters *ejusdem generis*. If it had stood "and other fixtures" alone, there might have been weight in the argument; but here the expression "and fixed furniture therein" which follows, to my mind, entirely defeats it. The *other fixtures* must, perhaps, be *ejusdem generis*; the *fixed furniture* need not be so.

WILLIAMS, J.—The terms *fixtures* and *fixed furniture* are used in a manner which precludes the supposition that they were used as *synonymous* expressions. These articles come within what was in all probability the *precise* meaning of the testator.

Rule refused.

DOE, on the demise of BULLEN, v. MILLS.

EJECTMENT, tried before Lord Denman, C. J. at the last Dorset assizes, for a strip of land lying on the side of a road which ran between two estates in which *Bullen* and *Mills* were respectively interested, — the estate of *Mills* being *nearest* to the locus in quo. One *Williams*, having entered upon this strip of land without any title, and built a cottage upon it, was prevailed upon by *Bullen* to take from him a lease by indenture for a term of 99 *A.* having, without title, entered upon land and built a cottage, afterwards accepts a lease (by indenture) from *B. C.*, claiming the land as his own, pays to *A.* 20*l.* to give up the possession to him.

Held, (in ejectment on the demise of *B.* against *C.*) that *A.* has estopped himself from controverting the title of *B.*, and that *C.* is bound by the estoppel, as having come in under, and received the possession, from *B.*

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same thing as if *Williams* had originally *come in* with the leave of *Bullen*. In truth he *takes* the land from *Bullen*; consequently, *Williams* could not dispute the title of *Bullen*, and therefore the only question is, whether the *defendant* came in under *Williams*? Now he is said not to have come in under *Williams*, because *Williams* refused to give up the possession to *Mills*, whereupon the latter, in order to induce *Williams* to quit, gives him 20*l*. That was either a *collusive bargain* between *Mills* and *Williams* for the purpose of enabling *Mills* to dispute the landlord's title, or a *purchase* of *Williams*'s interest; and in either view of the case, *Mills* cannot dispute the landlord's title.

WILLIAMS, J.—I am of the same opinion. It appears that Mr. *Erle* presented this to my lord at the trial, upon the same ground upon which he has attempted to sustain his motion to-day. That ground is not, in my opinion, tenable. It appears to me that this is a case which comes within the rule that a party is precluded from disputing the title of the person under whom he obtains possession; for upon the present occasion, there being some doubt with regard to the title to the property in question, *Mills* purchases, for a given sum of money, the interest of *Williams*, who was possessed immediately under *Bullen*, and held a lease from him. I do not think that, after having got into possession in such a way, he should be allowed to have *second thoughts*, and say that all that has been done was idly done, and that really he had nothing to do with any holding under *Bullen*. That cannot be allowed. I consider this case to be within the principle of that(a) to which allusion has been made.

Rule refused (b).

(a) *Doe d. Knight v. Lady Smythe*, *suprà*, 26; acc. *Doe d. Harwood v. Lippencott*, Bart., before Wood, B., at chambers, July, 1817, (*Manning* for the lessor of

the plaintiff, and *Puller* for the defendant,) shortly stated, Adams, *Ejectm.* 2d edit. 230.

(b) *Mills*, who had received the possession from *Williams*, not *ab*

*inuito* but *by contract*, could stand in no better position, in respect of a possession so acquired, than *Williams*. *Williams* having taken a lease by *indenture*, was, during the continuance of the term thereby created and *accepted*, estopped from denying the title of *Bullen* his lessor, whether he obtained the possession from *Bullen* or not; Litt. sec. 58; Co. Litt. 47 b.

"In no case can a lessee *by indenture* defeat the lease, except by an *entry* made by a stranger;" per *Danby*, C. J. in *The Abbot of Beham v. The Prior of Michelham*, T. 9 H. 6, fo. 48, pl. 14. "In a lease by *indenture*, both parties are concluded to say the contrary but that the lessor *had* the land in *possession* to pass, and that it *passed* in *possession* according to the tenor of the lease," Per un apprentice (*Plowden* himself) arguing, in *Smith v. Stapleton*, Plowd. 434 a.

If the lease to *Williams* had been by deed poll (M. 20 E. 3, fo. 10, pl. 8, acc. per *Littleton*, J., Co. Litt. 47 b) or by parol, or if the lease, though by *indenture*, had expired *before* the bringing of this ejectment, it might have been doubted whether the acceptance of the lease would have been more conclusive against the lessee than an attornment and payment of rent; which if made to a party from whom the possession had not been *originally* derived, would create no estoppel. *Rogers v. Pitcher*, 6 Taunt. 202, 1 Marsh. 541; *Gravener v. Woodhouse*, 1 Bingham. 38;

2 Bingham. 71; 7 B. Moore, 289; 9 B. Moore, 148. By distinguishing between estoppel by *indenture*, which ceases with the cesser of the term, and estoppel by *acceptance of possession*, which continues till that possession has been restored to the party from whom it was received, all the cases will be reconciled. And see Co. Litt. 41, n. 237; *ibid.* 55, n. 372, 373; *Keilwey*, 65; *Anon.* 1 Leon. 156; *Mitford*, Plead. 115; 1 Madd. Cha. 177, 178; *Homan v. Moore*, 4 Price, 5; *Dungey v. Angove*, 2 Ves. jun. 304; *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 Ves. 383, 385, 386; *Balls v. Westwood*, 2 Campb. 11; *post*, 82, note (a).

Unless *Williams's* possession be considered as derived, not from the person who, having *title*, had power to confer that possession, but from *any* party whom *Williams* might thereafter choose to recognize as landlord, this difficulty appears to present itself—*Bullen*, by treating *Mills* as assignee of *Williams*, admits that his own right of entry was suspended during the term. But by bringing ejectment, *Bullen* in effect asserts that the term was forfeited by a disclaimer of tenancy on the part of the assignee antecedent to the demise laid in the declaration. Then *Bullen*, having elected to treat the term as determined by forfeiture, seems to have abandoned the right of saying that *Mills* was bound by the *estoppel*, the force of *such* an estoppel being spent as soon as the term expires.

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LORD v. CROSS and others.

Where a defendant, after judgment in an action in the Common Pleas at Lancaster, has removed *his person* out of the jurisdiction of the County Palatine, a superior Court, upon an affidavit of these facts (without shewing that he has also removed his *goods*), will, under 4 & 5 Will. 4, c. 62, s. 31, order a *capias ad satisfaciendum* to issue.

**KNOWLES** moved for leave to issue a writ or writs of execution against the defendants under the following circumstances. The action was brought in the Common Pleas at Lancaster, and judgment recovered therein, and the defendants had removed out of the County Palatine. By 4 & 5 Will. 4, c. 62, s. 31, it is enacted, that whenever a defendant in any suit in which judgment shall be recovered in the Court of Common Pleas at Lancaster, *shall remove his person or goods* out of the jurisdiction of the said Court, it shall be lawful for any of the superior Courts at Westminster, upon a certificate from the Prothonotary of the Court of C. P. at Lancaster, of the amount of judgment obtained in such action, to issue a writ or writs of execution thereupon. In this case the certificate of the Prothonotary had been obtained; and the affidavit stated that the defendants had removed out of the County Palatine, but did not state that the defendants had removed *their goods*; and *Littledale, J.*, before whom the motion was first made in the Bail Court, was of opinion that the affidavit was insufficient in that respect. His lordship relied on the form of affidavit given by Mr. *Tidd*.(a)

*Knowles* argued in support of his motion. The terms of 4 & 5 Will. 4 have been complied with. All that the present statute requires previously to the issuing of a writ of execution is, that the defendant should have removed *either his person or his goods* out of the jurisdiction of the Court of the County Palatine, and the affidavit shows that these defendants have removed *their persons*. The form in *Tidd's Forms*(b), referred to by *Littledale, J.*, is framed upon the statute 33 Geo. 3, c. 68, s. 1, the words of which are (c) more general, and differ from those of the statute now in force.

(a) *Tidd's Forms*, 6th ed. 154.

(b) *Ib. Sed vide*, *ib.* 450.

(c) "That in all cases where

final judgment shall be obtained in any action or suit in any of the said courts, it shall and may be



The COURT were of opinion that the affidavit was sufficient to warrant the issuing of a writ of execution against the person, and directed a *capias* to issue.

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Rule absolute granted in the first instance.

lawful to and for any of His Majesty's Courts of record at Westminster, upon affidavit made before a judge or commissioner authorized to take affidavits in such Court, and filed therein, of such judgment being obtained, and diligent search and inquiry having been made after the person or persons against whom such final judgment shall be obtained, or his, her, or their effects, and of execution having issued against the person or persons or effects, as the case may be, of such person or persons against whom such final judgment shall be obtained,

and that the person or persons, or effects of such person or persons, are not to be found within the jurisdiction of such court, to cause a transcript of the record of the said judgment to be removed into such Court at Westminster, and to issue writs of execution thereupon to the sheriff of any county, city, liberty, or place, against the person or persons, or effects of such person or persons, against whom such final judgment shall be obtained, in such manner as upon judgments obtained in the said Courts at Westminster."

RUPPELL and another v. ROBERTS and DEMPSEY.

ASSUMPSIT for goods sold and delivered, and on the common money counts. Plea, by *Dempsey*, the general issue. Judgment by default against *Roberts*. At the trial before Lord Denman, C. J., at the London sittings after the last term, the plaintiffs sought to recover 530*l.* 15*s.* the price of a cargo of timber shipped by them in April, 1834. *Dempsey* was a timber broker at Liverpool, at whose suggestion *Roberts* wrote a letter, ordering the timber. *Roberts* accepted and paid a bill of exchange drawn by *Dempsey* for the amount of the freight. The invoice was also made out to *Roberts*. Evidence was given to shew

price of the goods, it is competent to *C.* to shew that *A.* and *B.* were jointly interested in the purchase.

*A.*, at the suggestion of *B.*, by letter, orders a cargo of timber of *C.* The invoice is made out in the name of *A.*, and a bill of exchange is drawn by *B.* on *A.*, for the amount of the freight, which is paid by *A.* In an action brought by *C.* against *A.* and *B.* for the

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that the defendants were *jointly* interested in the shipment. It was objected, on behalf of *Dempsey*, that as the plaintiffs had originally contracted with *Roberts*, they could not now make *Dempsey* a party to the contract. Lord *Denman* overruled the objection, and a verdict was found for the plaintiffs. Leave was however given to the defendant *Dempsey* to move to set the verdict aside, and enter a non-suit.

W. H. Watson now moved accordingly. The order for the goods—the invoice for them—and the bill of exchange for the payment of the freight, are all made out in the name of *Roberts*. This was clearly a contract with *Roberts*; and the plaintiffs cannot now treat another person as a joint contractor. It is wholly unlike the case of a concealed partner. [*Patteson, J.* Suppose the case of a secret partner,—would the circumstance of the letter, bill, and invoice, being in the name of one partner, make any difference. This seems to have been an agreement that the name of one should be used for *both*.] It is wholly unlike the case of parties trading under the name of one as the style of the firm.

The order for the timber, which was above the value of 10*l.*, being of the value of 530*l.*, was given *in writing*. The admission of the evidence was allowing the plaintiff to vary the contents of a *written* instrument by *parol* evidence. [*Patteson, J.* This is an action for goods sold and delivered. *Taunton, J.* The statute of frauds has nothing to do with the question.]

By the COURT—

Rule refused (*a*).

(*a*) And see *Paterson v. Gandasequi* (*Gandasegui*), 15 East, 62; *Addison v. Gandasequi* (*Gandasegui*), 4 Taunt. 573 (where, in the marginal note, read “*B. debits A.*,” for “*B. credits A.*”); *Thomson v. Davenport*, 4 Mann. & Ryl. 110, 9 Barn. & Cressw. 78.

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The KING v. GARSIDE and MOSELEY.

AT the last assizes for the *county* of Chester the prisoners were convicted, before *Parke*, B., of the murder of Mr. *Thomas Ashton*, by shooting him with a pistol. A proclamation, dated the 6th January, 1831, had appeared in the *Gazette*, declaring that His Majesty would grant a free pardon to any person (except the individual who had actually fired the shot) who would give such evidence as would lead to the conviction of the parties concerned in the murder. Previously to the trial some information was given by *Garside*; and *Parke*, B., desired the jury to consider whether *Garside* was the individual who actually fired the shot. The jury found both the prisoners guilty, and that the blow by which Mr. *Ashton* was killed was inflicted by *Garside*.

The trial took place on Wednesday the 6th of August last, and the prisoners were sentenced to be executed on the following Friday. A dispute, however, arose between the sheriffs of the *city* and of the *county* of Chester, as to which sheriff was bound to carry the sentence into execution; and in consequence of this dispute, the prisoners were respited until the 18th November.

The dispute between the two sheriffs arose out of the various constructions put by them upon a section of the act of 11 *Geo.* 4, and 1 *Will.* 4, c. 70. Previously to the passing of that act, all criminals tried within the county of Chester were tried before the Chief Justice (of the County Palatine) of Chester, and a rule of Court was made for the execution of the prisoners, which the sheriff of the *city* of

The Court of King's Bench has authority to order the sheriff of any county, or the marshal of the Court, to carry into execution a sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol delivery.

A proclamation promising a pardon cannot be pleaded as a pardon.

But where such proclamation had been made, the Court, in their discretion, deferred the awarding of execution upon the sentence until the prisoner should have had time to apply to the Secretary of State for a pardon, according to the terms of the proclamation.

The Attorney General,

upon motion, is entitled, as of course, to a habeas corpus and certiorari to bring up a prisoner and the record of his conviction in a case of felony.

In a case of conviction for murder, in which the prisoners were brought up by habeas corpus, and the record by certiorari, the Court gave the prisoners three days time to examine the record and instruct counsel to shew cause why execution should not be awarded against them.

Scmble, that a pardon after judgment may be pleaded ore tenus, and in bar of execution, and there may be a demurrer to such a plea ore tenus.

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asked whether they had any thing to say why execution should not be done upon them.

This question having but put by Mr. *Dealtry*,

Dunn, for *Garside*, applied that the prisoners might be remanded for three days, to give him an opportunity of being fully instructed. In *Rex v. Ratcliffe(a)* the defendant had been convicted of high treason: he escaped from the Tower, and after a lapse of thirty years was taken: he was brought to the bar of this Court, that the Court might order the previous sentence to be carried into execution. On that occasion the Court granted three days to the defendant to consider of his plea.

Campbell, A. G. The motion would have been immediately assented to, on the part of the crown, had any necessity been shewn for it. In *Rex v. Ratcliffe* the identity of the defendant was a matter of doubt. He was apprehended thirty years after his conviction, and it was necessary for him to have time to decide whether he should plead the king's pardon or non-identity. The prisoners at the bar do not dispute their identity. They rose when their names were called, and thereby admitted their identity. In *Rex v. Rogers(b)* a similar request for time was made, and refused.

Dunn, in reply. In *Rex v. Ratcliffe*, although no ground was stated for the application, yet the Court thought it was reasonable that some little period of time should be given to the prisoner. The conviction may not be good. As to the argument that these prisoners have *acknowledged* their identity, by rising when their names were called, it might as well have been said that *Charles Ratcliffe* acknowledged his identity by being brought to the bar of this Court.

(a) *Ante*, 34 (g).

(b) *Ante*, 35 (c).

The Court retired for a short time.

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Lord DENMAN, C. J., on their return, said,—The Court wishes for a short time to consider of the novel circumstances of the proceeding now before them. Certainly no ground of doubt has been suggested as to the prisoners at the bar being the persons convicted of the murder; nor has any reason been given why the sentence passed at the assizes should not now be carried into execution. But the present mode of proceeding being so peculiar, and the Court having now, for the first time, the record and return before them, and the prisoners' counsel not having had an opportunity of examining their contents and considering their effect,—we think, that although the Court cannot hold out the least hope to the prisoners that the sentence which has been passed upon them will not be carried into effect, it is yet right, in the exercise of our discretion, to follow the precedent in *Ratcliffe's* case rather than that in *Rex v. Rogers*. In the former case it is stated, by Mr. Justice *Foster*, that a few days time was granted to the prisoner, that his counsel might have an opportunity of knowing the truth and merits of his case.

The prisoners, in this case, must be brought to the bar on Thursday morning, the 21st November next.

Dunn then moved, that when the prisoners were again brought up, the judge's notes of the evidence at the trial should be in Court.

Lord DENMAN, C. J.—It is quite clear that we cannot grant that.

On Thursday, the 21st of November, the prisoners were again brought to the bar of the Court.

Campbell, A. G. moved that the prisoners should be asked

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if they had any thing to say why execution should not be awarded against them.

Dunn moved that the return to the writ of habeas corpus and certiorari should be read.

The returns were then read.

Plea in bar of
execution,
ore tenus.

Dunn. Execution cannot be awarded against *Garside*, because he is of legal right entitled to the king's pardon. The prisoner is entitled to make this plea, ore tenus. [Lord Denman, C. J. The prisoners may plead that if they think fit.] I plead it for *Garside*. (*Dunn* then read the proclamation.) Information was given by *Garside*, in consequence of which *William* and *James Moseley* were apprehended, and the latter convicted. These facts *Garside* is ready to verify. In *Rex v. Rudd*(a) Lord Mansfield says, "There are three ways, in law and in practice, which give accomplices a right to a pardon; and there is one mode which entitles them to a recommendation to the king's mercy. The three legal ways are;—first, in the case of *approvement*, which still remains a part of the common law, though by long discontinuance the practice of admitting persons to be approvers is now grown into disuse; secondly, of persons who come within the statutes 10 & 11 Will. 3, c. 23, s. 5, and 5 Anne, c. 31, s. 5; and thirdly, the case of persons to whom the king has, by special proclamation in the Gazette, or otherwise, *promised* his pardon." *Garside* has been pardoned in the *third* of the ways mentioned by my Lord Mansfield. It cannot be said by the attorney general that the king's *promise* of pardon is not a pardon, since it is a rule that in construing pardons they are to be taken most strongly in favour of the person pardoned, and against the crown.

Demurrer,
ore tenus.

Campbell, A. G. The facts stated can be of no avail now. I demur to the plea ore tenus. If the prisoner has

(a) 1 Cowp. 335.

been pardoned, either by act of parliament, or under the great seal, it must be pleaded. A *promise* of pardon cannot be pleaded in bar of an indictment. It is laid down in *Blackstone's Commentaries*(a) that a pardon must be under the *sign manual*(b), and that even a *warrant under the great seal* is not a complete pardon. The king's charter of pardon must be pleaded *at the time of the arraignment*. If a man is indicted, and has a pardon in his pocket at the time he is arraigned, yet if he pleads the general issue, he thereby waives his right to the pardon, and cannot afterwards take advantage of it. Besides, the question was submitted to the jury at the trial, whether *Garside* had actually fired the pistol, and the verdict returned was, "both guilty, the blow inflicted by *James Garside*." The plea, therefore, can be of no avail, as it was by *Garside's* hand that the murder was committed.

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Dunn, in reply. If a promise of pardon by his majesty is not considered as a pardon, the consequence will be serious, for no accomplice will give information of a murder committed, if, after the information is given, he is to be charged and punished for his crime. In point of law *Garside* is entitled to plead the king's pardon, and this is the proper time to plead this plea. It would have been useless to plead this before the trial, because the terms of the proclamation were not then complied with. In *Rex v. Hunt and Thurtell*, it was urged by *Hunt's* counsel, when he was arraigned, that *Hunt* had given evidence which led to the finding of the body of the party murdered, and the answer from the Court was, that the proper period for such a plea had not arrived. After the prisoner had been convicted his life was spared, on such terms as the crown thought proper. The finding of the jury that *Garside* fired the pistol is of no effect, as that was not part of the issue joined. Besides, that is not indorsed on the indictment,

(a) Vol. iv. p. 400.

(b) Vide *Bullock v. Dodds*, 2 Barn. & Alder. 258.

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and is no part of the record. It is therefore submitted that execution ought not to be awarded until the crown has had an opportunity of considering the circumstances of the case.

Moseley was then asked if he had any thing to say why execution should not be awarded against him. He replied that he was not guilty, and that *Garside* had accused him falsely.

Lord DENMAN, C. J.—The two prisoners, *James Garside* and *Joseph Moseley*, have been brought before us by a writ of habeas corpus, in custody of the constable of Chester Castle, accompanied by a record of their conviction for murder. They have been called upon to say why execution should not be awarded against them. *James Garside* has pleaded that he is entitled to be pardoned, as he has complied with the terms of the king's proclamation. It is argued, that this is a *legal right*, and reference has been made to a case in 1775, decided by Lord *Mansfield*. In that case his lordship states, that there are three ways in law which give an accomplice a right to a pardon. First, in the case of an approvement; secondly, by statutes 10 & 11 *W. 3*, and 5 *Anne*, c. 31; and thirdly, the case of persons to whom the king has, by special proclamation in the Gazette, *promised* his pardon: and this third case is relied on as giving the prisoner a legal right to a pardon. But it is quite clear, that such a plea can furnish no legal defence against an indictment, nor any legal reason why execution should not be awarded. The application in the case referred to was merely that the parties should be admitted to bail. Allusion has also been made to *Rex v. Thurtell*, in which case execution was delayed by the learned judge before whom the trial took place, in order to give time for an application to the Secretary of State. In that case, the learned judge was giving effect to no *legal right*, but with that

extreme *caution*, (which should always be observed towards persons under sentence of death,) he, in the exercise of his *discretion*, afforded an opportunity to the crown to fulfil its contract, *if* any such had been made. We cannot enter into the particular circumstances of the case. Those are for consideration in another quarter. We cannot, however, presume that the king will not perform his promise, most strictly and faithfully, to the meanest and the most criminal of his subjects. Ample time has already been furnished for an application for a pardon to the crown. But that there may be no possibility of doubt, time sufficient to review and reconsider the application, which had been already made, will be afforded by us in awarding the day of execution. *Joseph Moseley* has been called upon to say why execution should not be awarded against him, and all he says is, that he is not guilty. The Court must, therefore, proceed in the execution of its solemn and painful duty.

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Campbell, A. G., then prayed that execution be awarded against the prisoners.

M. D. Hill then moved, on the part of the sheriff of Middlesex, that the award of execution should not be directed to him.

Lord DENMAN, C. J.—We think we ought not to hear you. The sheriff of Middlesex is no party to this proceeding. We apprehend we have power to award the execution to any sheriff in England.

M. D. Hill. The custody of the prisoners has been changed. They are now in the custody of the gaoler of Newgate, who is the minister of the sheriff of Middlesex. If the Court *has* the right of awarding the execution to be done by any sheriff, that right has never been *exercised*.

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Lord DENMAN, C. J.—We think it is not competent to us to hear any argument.

TAUNTON, J., then proceeded to pronounce the order of the Court,—That execution be done upon the prisoners on Tuesday next, by the marshal of the Court of King's Bench, according to due form of law, and that the sheriff of the county of Surrey do assist in the execution thereof.

On Tuesday, November 26th, both the prisoners were executed at Horsemonger Lane Gaol.

ROE d. BLAIR and others v. STREET and FAIRBANKS.

A., lessor at will, B., lessee at will, C., under-lessee at will. A demand of the possession made upon the premises from the wife of C. is sufficient to entitle A. to maintain ejectment.

Whether a demand made off the premises, from the wife of C. would be sufficient, *quære*.

A party, who defends in ejectment as landlord as to Whiteacre, and as tenant for Blackacre, cannot take advantage of a defect in the service of a demand of possession, made upon the tenant of Blackacre, for the purpose of determining an estate at will.

Where a verdict has been obtained in ejectment against A. and B., who defended for different parts of the premises in the declaration, the Court, after setting aside the verdict as to A., refused to amend the *postea*, by confining the verdict as against B. to those premises for which B. specifically defended.


EJECTMENT, tried before Tindal, C. J., at the Derbyshire spring assizes, 1834.

The lessors of the plaintiff contracted to sell the premises to one *Bainbrigge*, who was let into possession. By *Bainbrigge* they were subsequently demised to *Street*, who underlet a part to *Fairbanks* (a), and retained the remainder in his own occupation. *Fairbanks* defended as tenant for his part. *Street* defended for the whole; viz. for so much as was in *Fairbanks*' possession as landlord, and for the residue as tenant. In the consent rule the premises defended for, and the parts occupied, by each, were particularly described. *Fairbanks*'s part was very inconsiderable. A

(a) See Co. Litt. 51 b (3); *Hales*, MSS. "The lessor may, by actual entry into the ground, determine his will, in the absence of the lessee; but by words spoken from

the ground, the will is not determined till the lessee hath notice." Co. Litt. 55 b. See also *Dinsdale v. Iles*, 2 Lev. 88; *Hinchman v. Iles*, 1 Lord Raym. 224.

written demand of possession, directed to "*Bainbrigge, Street, Fairbanks*, and all whom it might concern," had been served on the wife of *Street*, at his dwelling-house, which was not on the premises, and also on the wife of *Fairbanks*, upon the premises. It was objected that this demand was insufficient, and that it ought to have been served on *Bainbrigge*. The learned chief justice, without pronouncing decidedly upon the demand made on the wife of *Street*, was of opinion that the demand on the premises upon the wife of *Fairbanks* was sufficient, as against *Fairbanks*, to determine the tenancy at will; and a verdict passed against him. A verdict was taken against *Street*; and leave was given to him to move to set that verdict aside and enter a nonsuit.

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Balguy, in Easter term last, moved for a rule nisi for a new trial as to *Fairbanks*, and for a nonsuit (a) as to *Street*. The tenancy at will could only be determined by some demand or act of the lessor, operating against *Bainbrigge*. There was no privity between *Bainbrigge* and the persons of whom the demand of possession was made. If *Bainbrigge* had been tenant from year to year, a notice to quit, given in the manner in which the possession was in this case demanded, would have been insufficient. *Pleasant v. Benson* (b). [Lord Denman, C. J. intimated that the Court would speak to *Tindal*, C. J., upon the subject.]

LORD DENMAN, C. J., on a subsequent day in Easter term, said—We think a rule nisi should be granted, but it must be confined to the property occupied by *Street*. The demand of possession, served upon the wife of *Fairbanks* upon the land, was sufficient.

(a) As *Street* and *Fairbanks* did not appear jointly, it was competent to the plaintiff to deliver a separate issue to each. In that case it would have been possible for the plaintiff to be nonsuited at the suit of one defendant only; but if a joint issue was delivered, the proper course would have been to move to enter a verdict for *Street*.
 (b) 14 East, 234.

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Goulburn, Serjt., in Trinity term shewed cause. It is impossible that *Street* can have a new trial on the ground taken, because he defended *as landlord* for a part. He cannot therefore take advantage of any defect as to a notice to quit or demand of possession, but must rely on title (a).

Balguy said that he could not support his rule.

The COURT, upon this, discharged the rule, but intimated that it by no means followed that because the verdict must stand, the lessors of the plaintiff would be entitled to the possession of the *whole* of the premises.

Rule discharged.

In Michaelmas term, after unsuccessful applications to the same effect to *Taunton*, J. and *Tindal*, C. J., at chambers, a rule nisi for amending the *postea*, by confining it to the premises in *Fairbanks's* occupation, was granted by *Littledale*, J. in the outer Court, and his lordship subsequently directed that the case should be argued before the full Court.

Goulburn, Serjt., and *Humfrey*, in this same term, shewed cause. This rule has been obtained without any affidavits, and has in effect been twice decided at chambers. This is not the proper time, if there is any, for applying for it. The only person who could have amended the *postea* is the judge who tried the cause; and he has refused. If the lessors take possession of more than they are entitled to, it will be time enough then to apply to the Court. *Bainbrigge* was evidently the real defendant; and this motion seems like an attempt to delay the proceedings, lest some application respecting *costs* should be made against him.

(a) See *Doe v. Creed*, 5 Bingh. 327.

Cowling, in support of the rule. This application is founded on the judge's notes, and is made in consequence of what fell from the Court in discharging the rule nisi for a new trial. The subject has not yet been decided. *Taunton*, J. at first was in favour of the application, but doubted his jurisdiction at chambers, and discharged the summons on the ground that the application should either be to the Court or the judge who tried the cause. The application to *Tindal*, C.J. was only made because it is the invariable practice to apply to the judge who tried, before applying to the Court, as *Littledale*, J. ruled, directing us to do. The chief justice could not, however, alter the *postea*, because the defendant does not complain of any defect in entering up the finding of the jury, but alleges a point of law, which, having been reserved at the trial, can only be disposed of by this Court. [Lord *Denman*, C.J. Have you any authority for such an application? *Taunton*, J. The verdict in ejectment is always general—for fifty messuages, fifty acres, &c., and there is nothing to identify the particular premises (a). How then could any alteration of the *postea* improve your condition? How could the sheriff, on looking at the *postea*, know on what premises he ought to enter on the writ of *habere facias possessionem*?] I have not been able to find a precedent for this particular application; but there are many cases where the Court, and not the judge who tried, has amended the *postea*. The sheriff, on executing the writ, would have a right to look at the consent rule (b), and to deliver possession accordingly.

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(a) This arises from the inveterate practice of stating the premises, for which the tenant (or the landlord) means to defend, in the consent rule with the same obscure generality as in the declaration. If the consent rule were correctly framed, there would be no obscurity in the verdict and judgment, as the *defendant* would

be entitled to a verdict and judgment in respect of those tenements in the declaration to which lease, entry and ouster were neither confessed nor proved. In this case, however, the premises for which each party defended are stated to have been *particularly* described in the consent rule.

(b) But see the preceding note.

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Though the declaration in ejectment is general, it is in substance an action to try the right to the premises contained in the consent rule. If this application be not granted, the plaintiff in consequence of his verdict against *Fairbanks*, whose premises are small in comparison with *Street's*, will be entitled to take possession of all, though it will be contended that he has clearly no right to those in *Street's* occupation, if the Court should not think the defendant precluded from urging that point.

PER CURIAM.—If the lessor shall confine the execution of the writ of possession to the premises in *Fairbanks's* occupation, good and well; but however that may be, as no authority has been cited for this application, and it is quite a novel one, the rule must be

Discharged.

MASON v. MORGAN.

A promissory note, payable to S., she being the wife of A., may be indorsed by A. alone.

ASSUMPSIT upon a promissory note for 180*l.*, made by the defendant. The declaration contained three counts, in one of which the note was described as made payable to *Sarah Barnard* or her order, and indorsed by *her* to the plaintiff; in another, as made payable to *J. and Sarah Barnard* or their order, and indorsed by *both*; and in the third as having been made payable to *J. Barnard* or *his* order, and indorsed by *him*. At the trial at the London sittings after last term, before Lord *Denman*, C. J., it appeared that the note had been made payable to *Sarah Barnard* (she being the wife of *J. Barnard*) or her order, and that it had been indorsed by the husband alone. It was objected that the note should have been indorsed by the wife as well as the husband; but this objection was overruled by the learned judge, and the plaintiff had a verdict.

Godson now moved for a new trial on the ground of misdirection. The note should have been indorsed by the wife. It is true that in *M^cNeilage v. Holloway* (a) the Court held that the husband might sue in his own name upon a bill of exchange, drawn payable to his wife *before* marriage, although the wife had not indorsed the bill. But the circumstance of the bill having been drawn *before* marriage makes an important distinction; and, besides, *Abbott, J.* entertained some doubts on the question even in that case. In a subsequent case of *Richards v. Richards* (b), where a promissory note was given to a married woman, as administratrix, by her husband and two other persons, it was held that after the death of the husband the wife might maintain an action against the surviving makers of the note. Here, both the husband and wife should have indorsed the note; for the right to sue upon the note would have survived to the wife, if her husband had died before the indorsement.

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LORD DENMAN, C. J.—The person really interested has indorsed the note, and that, I think, is sufficient.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule refused.

(a) 1 Barn. & Alders. 918.

(b) 2 Barn. & Adol. 447.



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By a local turnpike act it is provided, that in leases of the tolls the rent shall be made payable to the treasurer, and that in default thereof, *every such lease shall be null and void to all intents and purposes whatsoever.* A lease is made, whereby the rent is reserved to the trustees or their treasurer:—Held, first, that the reservation in the alternative is bad, within the former part of this clause.

And secondly, that the words "null and void to all intents and purposes," are to be construed as meaning *absolutely void*, and not *voidable* only.

And thirdly, that the above provision is not repealed by either of the General Turnpike Acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, but remains in full force.

Semble, that words at the end of a deed following the "In cujus rei testimonium, &c." form no part of the deed.

COVENANT for non-payment of arrears of toll due, under an indenture of lease. Plea: non est factum. At the trial before *Tindal*, C. J., at the Bedfordshire summer assizes, 1832, a verdict was found for the plaintiff, subject to the following case:

By a local and public act of 34 Geo. 3, for repairing certain roads in Bedfordshire, certain persons were appointed trustees for carrying the act into execution, and were empowered to appoint a clerk (in whose name they were authorized to sue) and a treasurer, (who was to give security and to account on oath if required,) and they were also empowered to erect turnpikes and toll-houses, and to take tolls, which turnpikes, toll-houses and tolls, were vested in them by the act.

By section 28, the trustees were empowered at any meeting, upon notice in writing under their hands and seals, to let to farm the tolls to the highest bidder, at a public bidding, provided that the leases, contracts, or agreements for the same were in writing and duly executed by the *person or persons taking or farming such tolls, and also by the trustees*, but that the same should not be let for more than three years at any one time, and that the rent to be paid for the said tolls *should be made payable and should be paid to the treasurer of the said trustees.* In default whereof, every such lease, contract, or agreement, *should be null and void to all intents and purposes whatsoever.*

The plaintiff, who is clerk to the trustees, put in the counterpart of an indenture, dated 2d May, 1828, made between the trustees of the first part, *Elizabeth Riches* of the second part, and *George Morrice* and *John Morrice* (the defendant) of the third part; which recited, that at a meeting of the trustees on that day, by public notice duly

given, for the purpose of letting to farm the tolls of the several gates erected on the same road, in the manner directed by 3 *Geo. 4*, for regulating turnpike roads in England,—*E. Riches* became the highest bidder for the tolls, payable at certain turnpike gates therein mentioned, at the yearly rent of 180*l.*, and was accordingly declared the renter thereof for the term of three years,—and that *G. M.* and the defendant had, at her request, and in order to satisfy the conditions of letting the said tolls, agreed to become parties to the indenture, and to enter into the covenants thereafter contained, as sureties with *E. R.* for payment of the said yearly rent, and for such other purposes as thereafter expressed; and it was witnessed that the trustees, parties to the indenture, in pursuance of the authority given to them by the several acts, or any of them, in that indenture mentioned did demise and let unto *E. Riches* certain toll-houses, tolls, &c. to hold the same unto *E. Riches* for the term of three years, yielding and paying therefore unto the trustees of the said road for the time being, or to their treasurer, at his dwelling-house, the yearly rent of 180*l.* And *E. R.*, *G. M.* and the defendant did jointly and severally covenant with the trustees of the said road for the time being, that *E. Riches* should pay unto the trustees of the said road, or their treasurer for the time being, as aforesaid, the said yearly rent.

And the indenture concludes in the following words:—
“ In witness whereof to one part of these presents, intended to remain in the hands of the said *E. Riches*, the said trustees, parties hereto, have set their hands and seals; and to the other part thereof, intended to remain in the hands of the said trustees, the said *E. Riches*, *G. M.* and *J. M.* (the defendant) have set their hands and seals, the day and year first above written.”

The said counterpart indenture was executed by *E. Riches* and by the defendant, but was not executed by any of the trustees, or by the clerk or treasurer; and no indenture

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was produced executed by any of the trustees, or by the clerk or treasurer.

The question for the opinion of this Court is, whether this action is maintainable; the indenture produced at the trial not having been executed by the trustees, or the clerk or treasurer, and no other indenture having been produced; and the rent reserved being made payable to the *trustees* of the said road, or to their treasurer, and not reserved and made payable to the treasurer only,—reference being had as well to the 4th, 55th, and 57th sections of the 3 Geo. 4, c. 126, and the 52d section of the 4 Geo. 4, c. 95, as to the provision of the local act.

First point:
Estoppel by
counterpart of
indenture.

F. Gunning, for the plaintiff. It is a valid lease. The questions with respect to the validity of the lease are four. I. The first question is, whether the action is maintainable, the indenture produced at the trial not having been executed by the trustees, or by the clerk, or by the treasurer. The production of the *counterpart* was sufficient. In all cases where an action is brought upon an indenture of lease, by a landlord against his tenant, (and this is an analogous case,) the production of the counterpart is deemed sufficient. The recital at the conclusion of this indenture of lease, that to one part of the lease intended to remain in the hands of *E. Riches*, the trustees, parties thereto, *had* set their hands and seals, is a statement under the hand and seal of the defendant, that the trustees have executed a lease, and the defendant is therefore *estopped* from denying that fact. In *Burleigh v. Stibbs* (a), the declaration contained an averment that one *Rider* *had* put himself apprentice to the defendant and his wife. This averment was held to be sufficiently proved by the production of that part of the indenture executed by the defendant. *Nash v. Turner* (b) seems to establish the same principle. [*Tauntan, J.* The words to which you refer must have been put into the indenture *before* it was executed.] The two parts of the lease were

(a) 5 T. R. 465.

(b) 1 Esp. 217.

no doubt executed at nearly the same time. A variety of cases establish the position, that a party who has executed a deed containing a recital, is estopped from controverting the truth of that recital (a).

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II. The local statute has been sufficiently complied with by making the rent payable to the *trustees or their treasurer*. The act does not say that the rent shall be paid to the treasurer *only*, and there is nothing illegal in such a contract as is entered into by the lease.

Second point:
Compliance
with local act.

III. But assuming that the terms of the statute have not been complied with, the lease is, according to the construction which the Courts have put upon words in other statutes, similar to those in this act of 54 Geo. 3, *voidable* only at the option of the parties, and not actually *void*. By the 41st section of 5 Eliz. c. 5, all indentures of apprenticeship made otherwise than by that statute ordained, are declared to be *void in law to all intents and purposes*. Yet in *Rex v. St. Nicholas, Ipswich* (b), Lord Hardwick held that the clause made such indentures not *void*, but *voidable* by the parties themselves, and by them only; and he added, "There are many cases where, according to the strict words of the statute, a thing is made void, yet has been held not to be absolutely void;" and two instances are then given by him. *Rex v. Woolstanton* (c), *Rex v. Evered* (d), *St. Nicholas v. St. Peter's, Ipswich* (e), *Gray v. Cookson* (f), are all illustrations of the same principle. [Taunton, J. Some of those cases proceed upon an erroneous principle, that the Court will do everything to support a settlement.] Upon the authority of these cases, and as the proviso in the act making the lease null and void is introduced for the benefit of the parties only, and not for any public purpose, the deed is only *voidable*, and is not *void*. [Taunton, J. Here, one of the parties chooses to avoid the lease.] It is now too late to elect to avoid the lease.

Third point:
Lease voidable
only, and not
void.

(a) Vide *ante*, 29 (b).

(b) 1 Bott. P. L. 530, pl. 744.

(c) 1 Bott. 606, pl. 876, 5th ed.

(d) 1 Bott. 554, pl. 757.

(e) 4 Burn. 466, 24th ed.

(f) 16 East, 27.

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Fourth point:
Lease valid
under General
Turnpike Act.

IV. This is a valid lease under the General Turnpike Act, (3 Geo. 4, c. 126,) the 4th section of which recites, that it is of great importance that one uniform system should be adhered to in the laws regulating the management of turnpike roads throughout the kingdom, and enacts that the provisions in that statute shall extend to all local acts. By the 55th section, power is given to the trustees to let to farm the tolls in the manner thereafter mentioned; and after a variety of regulations respecting the notices to be given of the intention to let, and the mode of letting the tolls, the same section provides that the renter shall enter into a proper agreement for the taking and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees shall think fit." This repeals the inconsistent provision in the local act, and enables the trustees to let the tolls under such an agreement as they think proper. This was a letting under the general act. The lease recites that notice was given to let the tolls under 3 Geo. 4. In the operative part of the deed, the trustees demise by virtue of the said several acts. It is clear, therefore, that this was intended to be a letting under the *General Turnpike Act*, and is consequently a valid lease.

F. Kelly, for the defendant. Unless the Court declares that the clause with respect to the letting of the tolls is repealed, this action cannot be sustained. These contracts, respecting the letting of tolls, are authorized only *by statute*, and are not within the common law.

First point:
Estoppel.

With respect to the first point. The counterpart produced at the trial *was not executed by the trustees*. No notice was given to produce the other part of the deed, so as to dispense with the necessity of its production. There was consequently no evidence of a deed executed by the trustees. It may even be admitted, that if the defendant had executed a deed which *recited* the execution by the trustees, he

would have been estopped, and the authority of *Burleigh v. Stibbs* and *Nash v. Turner* need not be disputed; but here there is no recital in any part of the deed. The clause "In cujus rei testimonium" forms no part of the deed. In *Comyns's Digest*, *Fait*, (E. 2), it is said, "A thing wrote after In cujus rei testimonium, is no part of the deed, though it was wrote before the sealing and delivery of the deed," citing 2 Rol. 23 l. 20 R. Cont. Mo. 3 (a).

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As to the second point. The local act requires, in express terms, that the rent shall be made payable to the treasurer. This, it is evident, is done designedly, and for very obvious reasons. By the local act, the treasurer is to give security for the performance of the duties of his office, and is likewise to account on oath when required. There are no such provisions with respect to the trustees, who are generally a very numerous body, and some of whom may not be in good circumstances.

Second point:
Compliance
with local act.

III. The only cases in which the words "null and void" are not allowed now to be construed according to their natural meaning, are where the dispute is between a landlord and tenant, as to the construction of a condition for the benefit of one of the parties. [*Patteson, J.* The prin-

Third point:
Lease void-
able, not void.

(a) The first of these authorities runs thus: "If a clause comes in a deed after these words, 'in cujus rei testimonium, sigillum apposui,' it is not any part of the deed, though it were written before the sealing and delivering, 1 Ma. Brooke, *Faits*, 72, agreed by the justices, et *ibid.* 76." Bro. *Faits*, pl. 72, is an original case, correctly transcribed by *Rolle*. But in pl. 76, Lord Brooke merely transcribes a short case from M. 21 E. 3, fo. 81, pl. 31, in which the only question raised or discussed was upon the effect of the omission of the word "meum," after "sigillum." The second authority (from Sir Fra. Moore) is this, "Mich. 28

H. 8, nota, that what is written in a deed after the In cujus rei testimonium, shall be parcel of the deed, as well as that which is written before. And this by *Norwich* and all the justices."

Covenant was held to be maintainable upon words of covenant after the In cujus rei testimonium, and above the seal; *Hamond v. Jethrell*, 1 Brownl. Rep. 59, and *Hamond v. Jethro*, 2 Brownl. 97.

A proviso inserted after the In cujus rei testimonium, and before the sealing, is part of the deed; *Thompson v. Butcher*, 3 Bulstr. 300, 301, 302, per *Doderidge, J.*

And see *Broke v. Smith*, Sir F. Moore, 679.

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ciple of those decisions is, that a party shall not be allowed to take advantage of his own wrong.] *This* provision is not for the benefit of one of the parties, but it is for the interest of both the lessee and the trustees. If the lease is void, no toll can be lawfully demanded by the lessee from *third* parties, nor can any rent be recovered from the lessee. With respect to the cases which have been cited, supposing even that the Court are prepared to support those cases, (which may well be doubted, as the decisions appear to be entirely unsupported by any correct *principle* of law,) they will not introduce the same kind of construction into any *new* class of cases; and there certainly has been no decision upon a statute in *pari materiâ* with the present, in which "void to all intents and purposes whatsoever" has been construed to mean "voidable" only. But supposing the words in this statute to mean *voidable* at the option of the parties, the effect is the *same* as regards the parties to the present action, for the defendant does elect to avoid the lease. [Lord Denman, C. J. The answer is, that it is now too late.] It is never too late for a mere *surety* for the payment of the rent.

Fourth point :
 Lease valid
 under General
 Turnpike Act.

IV. Then it is said, that the lease is valid under the *General Turnpike Act*. Neither the 55th nor the 4th section of that statute touch this case. The latter does not repeal any other act of parliament; and the 55th section contains only a variety of minute regulations respecting the letting of tolls. This act applies to future as well as to present acts. Suppose a future act were made in the terms of this local act, could it be contended that the general act had by anticipation repealed a future provision, such as that in the 28th section of this local act? It is only where there is no *direct* provision in a local act, that the provisions of the general act apply.

First point:
 Estoppel.

Gunning, in reply. It is said that a recital in that part of a deed called the *In cujus rei testimonium*, does not operate as an estoppel, as it is no part of the deed; and

Comyns's Digest is referred to as an authority for that position. The passage in *Comyns's Digest* quotes two cases, the one in *Rolle*, the other contrà in *Moore's Reports*, the latter of which must be taken to have over-ruled the preceding case in *Rolle(a)*. It appears from *Sheppard's Touchstone(b)*, that this is to be taken as a part of the deed. In enumerating the formal or orderly parts of a deed, the eighth part is stated by the author of that treatise to be the *In cujus rei testimonium*. Whether this be a *recital* or not, it is an *averment under hand and seal*, which is sufficient to constitute an estoppel.

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Then as to the second point. It is said that it was the policy of the act to make the rent payable to the treasurer on account of his greater respectability. Upon reference to the local act, it will be found that the *trustees* must be possessed of property to the amount of 40*l.* a year.

Second point:
 Compliance
 with local act.

Then it is said, that the cases cited upon the third point are not to be considered as law. They have hitherto been so considered, and have not been overruled. It may be true that one of them was decided on an erroneous principle, viz. that a Court will do every thing to support a settlement;—but that was not the sole ground of decision in *Grey v. Cookson*. Besides, here the party seeks to take advantage of his own wrong, and therefore it comes within the principle upon which the cases between landlords and tenants in general have been decided. It is too late for the defendant to elect to avoid the deed, after he has enjoyed the benefit of the demise.

Third point:
 The lease void-
 able, and not
 void.

Then with respect to the fourth point. The provisions in the general act are inconsistent with those in the local act, and therefore the latter are necessarily repealed. But supposing that the Court be of opinion that the lease is void, the defendant ought not, at this time, to be permitted to take advantage of its invalidity.

Fourth point:
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(a) *Vide supra*, 53(a), where it appears that the case in *Rolle* (from *Brooke's Abr.*) was in 1 *Mary*;

that in *Moore*, in 28 *Hen.* 8,—16 years before.

(b) Page 52.

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Lord DENMAN, C. J.—It was unfortunate that the trustees did not give notice to produce the deed in the hands of the lessee; but I believe none of the Court are disposed to think the case need turn upon the point as to the admissibility in evidence of the counterpart. There may be some question whether a recital in the subscribing part of the counterpart, that the deed has been executed under the hands and seals of the trustees, would not operate as an estoppel against a party executing the counterpart.

The other point appears to me to be one of very great importance—that the act requires that every lease of tolls shall make the rent payable to “the treasurer.” That, I think, must be taken to be “exclusive of all other persons;” it can never be enough to say that the rent may be made payable to the treasurer, or the trustees, or some one of their body. To have the rent payable to a large number, would be very inconvenient, and a single individual might possibly not be perfectly solvent. The question then is, whether full effect is to be given to words such as these: “that any lease that is executed in contravention of these provisions shall be null and void to all intents and purposes whatever.” It certainly is very extraordinary that there should be cases to show that words of that extent should not receive their natural and obvious meaning; but on the principle that a party is not *bound* to take advantage of any proviso in his own favour, it has been held in *settlement cases* that the word “void” means “voidable” only. And this same construction has been applied to agreements where a party could not take advantage of a proviso in his own favour, without committing some offence against public policy. But here, there is nothing of that sort. Indeed it might be said that there is something which may be called “public policy,” demanding the enforcement of this clause. The interests of the proprietors at large are intended to be protected by the provision which requires that one particular individual of

responsibility shall be the party to whom the rent shall be made payable. There is therefore the best public reason why this provision in the act, making a lease *void* in such case, should be carried into effect, if the rent is by that lease made payable to any other than the individual particularly pointed out.

But it is urged that the general act repeals this clause, because it says that the trustees executing leases shall comply with certain directions as to the notice to be given, the mode of bidding, and other things, and then goes on to say, "the rent shall be reserved in such manner and on such conditions as the trustees or commissioners shall think fit." But those words were not intended to repeal any restrictions—particularly a restriction founded upon a good principle—contained in any former act. The only intention was, that the trustees should appoint such conditions, and make the rent payable in such manner as they thought proper, *consistently* with the powers vested in them, and the duties imposed upon them by *other* acts. Those words, therefore, in the general act cannot be supposed to have been used with an intention to repeal the provision in the 28th section of this local act; which provision, therefore, stands in full force, and ought, upon every principle of reason, to be applied to this case. This lease is therefore void.

With regard to the *time* of taking advantage of the invalidity of the lease, I cannot understand why, if the lease be void, any party should not take advantage of its invalidity at any period.

TAUNTON, J.—Two objections have been urged against the validity of this lease. One is, that the trustees did not execute the lease. To this it has been answered, that, as there is a *recital* in the deed that, to one part of those presents intended to remain in the hands of the said *E. Riches*, "the said trustees, parties thereto, *have set* their hands and seals," that recital is binding on the defendant, who is only a surety, and therefore has a right to the

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strict proof of the legal existence of this obligation. But against that has been cited the authority of *Comyns's Digest, title Fait*. I do not wish to be bound by any opinion I may now throw out; for what I say is principally with this view—that I may not be supposed to accede to the argument used by Mr. *Gunning*; because I am at present most strongly inclined to be of opinion that the words which follow “*In cujus rei testimonium,*” form *no part* of the deed at all; that they are not matter of recital, and that therefore they will not estop the defendant in this case from urging the present objection. I do not, however, give a *definitive* opinion upon that point, since it is quite sufficient to decide upon the other. That which I have advanced is rather in the way of *protestation* than any thing else.

On the other question I certainly entertain no doubt whatever. The objection is, that the reservation is not to the treasurer alone, as it ought to be, according to the 28th section, but in the alternative—to the treasurer or trustees. Now there may be very good reasons for making the rent payable *only* to the treasurer. If the words in this section are not obligatory, I cannot conceive *any* words that can have a prohibitory force. The distinction has long subsisted in the construction of acts of parliament between statutes *directory*, and statutes *imperative*—whose provisions *must* be observed. According to the best of my recollection, the first instance in the books of a statute being construed to be *directory*, occurs in *Strange (a)*, where it was held, that the time appointed by the statute for the choice of overseers need not be observed to the letter, that that was a *directory* provision, and that the choice of overseers on a day not being “in Easter week or within one month after,” may be supported. There may be other cases to the same effect (*b*). I have

(a) *Rex v. Sparrow*, 2 Stra. 1123.

(b) Co. Litt. 360 a; *Leicestershire case*, 1 Peckw. El. Cases, 45; *Rex v. Pole*, 2 Selw. N. P. 7th ed.

1071 n; *Margate Pier Company v. Hannam*, 3 Barn. & Alders. 266; *Rex v. Mayor of London*, 4 Mann. & Byl. 36.

always understood the distinction between a directory and imperative statute to be this—a statute is to be construed to be *directory* when its provisions contain mere matters of direction; but when those matters of direction are followed up by such words as occur here, “or in default thereof every such lease, contract, or agreement, to be null and void to all intents and purposes,”—it is to be construed as *imperative*. Those latter words always amount to a direct, positive, absolute *prohibition*, which cannot be *dispensed* with. In the present case the statute provides that the rent which shall be agreed to be paid for the tolls shall be made payable to the treasurer of the said trustees, and then it goes on, “and in default thereof, every such lease, contract, or agreement, to be null and void to all intents and purposes whatever.” Now this lease is made under a power given to the trustees, and the terms of the power must be strictly complied with, as in other more familiar instances of powers. I cannot fashion a doubt to my own mind on the subject. But it is said, “the objection comes too late.” Now it is not at all explained *in what way* the objection comes too late. The lease, it is true, was executed in 1825, and it is a lease for three years; but there is no statement in the case as to when the present action was commenced, and therefore, for any thing that appears to the contrary, it may have been commenced during the continuance of the term. I know not in what other sense the objection can be said to come too late but this, that it has come after the expiration of the lease, whereas it ought to have been made during the pendency of it(a). I think therefore that there is nothing in this answer to the objection.

Then the General Turnpike Act has been relied upon to shew that, putting the two acts together, this lease may be supported. Now I agree that it is stated in the pre-


(a) On the part of the plaintiff, *receiving tolls*, and *thereby deriving benefit* under the demise, it seems to have been contended that the lessee could not, *after* treat that demise as a nullity.

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amble or the first section of that act (3 Geo. 4, c. 126), that it was the intention of the legislature to establish one uniform code of laws upon this subject ; but I do not see how that uniformity is in the slightest degree disturbed by giving its proper interpretation to the local statute in this case. If the statute of the 3 Geo. 4, c. 126, had contained any provisions directly *repugnant* to the provisions of the 54 Geo. 3, then I should have said that the provisions in the local act must yield to the provisions in the general act ; but I do not find that there is any provision in the general act that is at all repugnant to the provisions in the local act. The 55th section, which Mr. *Gunning* has relied upon, in the 3 Geo. 4, provides that certain preliminaries must be observed in letting out the tolls to farm ; and then it says “ that the highest bidder shall be the farmer or renter of the said tolls, and shall forthwith enter into a *proper* agreement.” That word “ proper ” must be construed by reference to the clauses of the local act. The section requires that the highest bidder shall enter into a “ proper agreement, for the taking thereof and paying the money at the times specified in such notice, with such sureties or securities for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit.” There is not in that section any *direct* repeal of the local act which makes it necessary that the rent should be reserved payable to the treasurer alone, but it only says that he shall enter into a lease, and that they may let under such conditions and in such manner as the trustees shall think fit. That does not give the trustees the absolute power of *dispensing* with all former provisions on the subject ; it means only upon such terms and conditions as would, *in the absence of* any statute to the contrary, be binding on the parties.

I do not think, therefore, there is any such repugnancy between these two statutes as to bring the case within the first clause of the 3 Geo. 4. In answer to the string of cases cited, and especially the case of *Rex v. St. Nicholas*,

Ipswich, I would refer to the late case of *Rex v. Gravesend* (a). The ground upon which Lord Tenterden, in that case, puts *Rex v. St. Nicholas, Ipswich*, is that the statute of *Elizabeth* on the subject of apprentices was not a *prohibitive* statute, but merely a *permissive* one.

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PATTERSON, J.—I am entirely of the same opinion, on the second ground, viz. that the rent in this case, instead of being reserved according to the directions of the act, and made payable “to the treasurer,” is made, by the terms of the lease, payable “to the trustees for the time being, or their treasurer.” It seems to me, that the object of the provision in the 28th section is to prohibit the making the rent payable to any person other than the treasurer, and I can conceive a very good reason for that where, as in this case, there is a numerous body of trustees. The treasurer is the person to whom the rent is to be paid in the first instance, and therefore the reservation in this lease is forbidden by the 20th section.

If that be so, the question is, what effect is to be given to the words “shall be null and void to all intents and purposes”? I confess I cannot have the least doubt in the world upon the subject. The natural meaning of those words is, that if the parties who make the lease—the trustees of the turnpike road—do not choose to draw it up according to the terms of the act, the lease shall be absolutely null and void.

A number of cases have been cited by Mr. Gunning, in which the Court has held that the words “null and void” should not have that operation, but shall be voidable only. It is sufficient to say that those cases are not upon acts of this description, and therefore do not bind this case. In *Rex v. Hipswell* (b) and *Rex v. Gravesend* (particularly the last), the Court distinctly said, that wherever a thing was prohibited upon pain of being null and void, full effect should be given to those words, and it should be

(a) 3 Barn. & Adol. 246.

(b) 2 M. & R. 474; 8 B. & C. 466.

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absolutely void. That being the case, I think we are justified in saying that we must give full effect to these words.

With respect to the argument, that the general act has taken off the effect of those words, I can find nothing in the general act in any way inconsistent with this 28th clause of the local act; and that being the case, I cannot perceive the slightest intention to repeal the local act.

As to the first objection, I do not decide it; I only notice it so far as to say, that upon that objection also the *impression* of my mind is in favour of the defendant.

WILLIAMS, J.—I am entirely of the same opinion on the ground that the reservation of the rent has not been made according to the terms of the act of parliament. The act is not directory, but peremptory, that the lease must be in the form prescribed, and that every lease which does not comply with that form is to be null and void to all intents and purposes whatever. Certain statutes have been deemed to be directory only in some of their provisions, and my brother *Taunton* has referred to one as to the nomination and appointment of overseers under the 43d *Eliz.*; but there is no provision in that statute that every appointment, except on the day named, shall be null and void to all intents and purposes. The answer which has been attempted to be given from the operation of the General Turnpike Act undoubtedly has received more than a sufficient answer from my learned brothers. I would only observe, that the main policy of that part of the act preceding the mention of a proper agreement being entered into, is to regulate the putting up of the tolls to auction; and there are somewhat fanciful and most laborious provisions about the mode in which that is to be done. I can see no answer to the objection made by the defendant.

It is said there are cases where the words "null and void to all intents and purposes" have been held to mean "voidable" only, and I was looking with great anxiety for any case which was not on the subject of settlement law.

Now why "null and void to all intents and purposes" should not be held to have their natural meaning when applied to the law of settlement, I do not know; but I am very glad to find that there are decisions which go the length of saying there shall be no more of such cases.

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Judgment of nonsuit.

HARRIS v. DUNCAN and others.

TRESPASS. *Duncan* pleaded the general issue, and the other defendants suffered the judgment to go by default. The jury found for *Duncan* upon the general issue, and assessed the damages against the other defendants at one farthing. The judge certified under 43 *Eliz. c. 6*, to deprive the plaintiff of his costs.

Where in trespass against *A.* and *B.*, *A.* pleads the general issue, which is found for him, and *B.* suffers judgment by default, upon which one farthing damages are assessed, it is competent to the judge to certify under 43 *Eliz. c. 6*, to deprive the plaintiff of his costs.

Steer moved to set aside the judge's certificate, contending that the statute did not apply to an assessment of damages when judgment had gone by default, and that such had always been considered to be the practice.

Cur. adv. vult.

Lord DENMAN, C. J. on a subsequent day in the term, delivered the judgment of the Court. After stating the objection, his lordship proceeded:—The enactment (a) is "If upon any action personal to be brought in any of her majesty's Courts at Westminster, not being for any title of lands &c., it shall appear to the judges of the same Court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered there in the same Court, shall not amount to the sum of 40s. or above that sum, in every such case the judge

(a) Section 2.

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and justices before whom any such action shall be pursued shall not award for costs to the party plaintiff any greater or more costs than the sum so recovered shall amount unto, but less, at their discretion." If the word "tried" is material, the present case has been tried, an issue having been joined against one defendant as well as damages assessed against the others; and Mr. *Tidd* states a case from 9 *Price's Reports* (a), (under the statute of *Charles 2* (b),) where, in trespass for breaking and entering the plaintiff's close, the defendant pleaded a right of way over the locus in quo—plaintiff took issue thereon, and new assigned *extra viam*; whereupon the defendant suffered judgment by default. The jury found a verdict for the defendant as to the right of way, and assessed the damages on the new assignment at one shilling. The Court held the defendant entitled to the costs of the issue found for him, *and to no more costs than damages on the new assignment*. It is true that to writs of inquiry *before the sheriff* the words of the statute of *Elizabeth* do not apply.

Rule refused.

(a) *Harber v. Rand*, 9 *Price*,
 336.

(b) 22 & 23 *Car.* 9, cap. 9. s.
 136.

BETTS and DREWE v. GIBBINS.

The rule that a tort-feasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an *obviously* illegal character.

It does not extend to a case in which there is any *bonâ fide* doubt whatever whether in point of law the act was authorized.

The rule as to contribution between joint-tort-feasors must be similarly confined.

Contribution is indemnity; and the same consideration that will support a promise to indemnify will also support a promise to contribute, et e converso.

In cases where an express promise will be supported, an implied promise arising out of the circumstances of the case will also be available.

Part delivery by a carrier to the consignee is *primâ facie* such a virtual delivery of the whole as puts an end to the consignor's right of stoppage in transitu.

Nyren and *Wilson*, and for delivering them to another person. Averment: that the plaintiffs, relying on the promise, refused and delivered accordingly; that an action was afterwards commenced by the assignees of *Nyren* and *Wilson* (who had become bankrupts) against the plaintiffs, for not delivering the said goods to *Nyren* and *Wilson*; and that the plaintiffs, in order to prevent further proceedings, paid a large sum of money. Breach: that the defendant would not indemnify the plaintiffs in respect of that sum. At the trial before *Denman*, C. J., at the sittings in London, after Trinity term, 1833, a verdict was taken for the plaintiffs with 157*l.* 5*s.* damages, subject to the opinion of this Court on the following case:

The plaintiffs carry on business as bargemasters and wharfingers at Bristol and London. The defendant is a manufacturing chemist at Neath, in Glamorganshire.

9th October, 1830. The defendant, in execution of a written order from *Nyren* and *Wilson*, who then carried on business in London, sent five tons of acetate of lime, in ten casks or hogsheads, from Neath to Bristol, to be from thence forwarded by the plaintiffs' boats to London; and he at the same time wrote to the plaintiffs in London, informing them that some casks had gone on by their boats to await his order in London; that he had written to their house in Bristol, directing that 30 casks containing liquids were for *M.* and *P.*, and 10 casks of dry goods marked (as in that letter mentioned) for *Nyren* and *Wilson*, and that he would be obliged by their carefully separating those casks from others, and having them taken away distinct, as he was afraid of confusion.

12th October. The defendant drew on *Nyren* and *Wilson*, at four months, for 161*l.* 1*s.* 2*d.*, the price of the ten casks of acetate of lime, and transmitted the bill to them for acceptance on that day; but *Nyren* and *Wilson* did not either accept the bill, or return it to the defendant, or pay it at maturity, or pay the price of the goods, although often applied to for that purpose.

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20th October. *Nyren* and *Wilson* made application to the plaintiffs respecting the above consignment, and at that time took away two of the ten casks.

2d November. The remaining eight casks being still at the plaintiffs' wharf, the brother of the defendant, acting by his authority, personally gave directions to the plaintiffs not to deliver the remaining casks to *Nyren* and *Wilson*, but to deliver them to the order of *John Elliott*, and signed the following order, which was delivered to the plaintiffs—
 "Please to deliver to the order of *John Elliott* the eight casks marked and numbered as below." Pursuant to this order, the plaintiffs delivered the eight remaining casks to *Elliott*.

29th October, 1831. *Nyren* and *Wilson* having become bankrupts, their assignees (through their attorneys) sent to the plaintiffs a letter demanding the eight casks of acetate of lime, as having been the property of the bankrupts.

3d November, 1831. The plaintiffs' attorneys sent to the defendant a copy of the above notice, accompanied with a letter, in which, after adverting to the notice, they wrote as follows: "You are aware that notice of the arrival of the hogsheads was given to *Nyren* and *Wilson*, and that two of the hogsheads were delivered to them; and the circumstances connected with the countermand of the remainder, and the subsequent delivery of them to your second order, are in your own possession; and as you only are interested in the dispute, and Messrs. *Betts* and *Drewé* (the plaintiffs) look to you for their indemnity, we beg to inquire on their part, what you intend to do under the circumstances; whether you wish the threatened action to be defended, or you will comply with the demand by sending eight hogsheads in lieu of those delivered to the order of Mr. *Elliott*, that Messrs. *Betts* and *Drewé* may hand them over to the assignees as required. In the event of your determining that the action shall be defended, we shall be obliged by your informing us

whether any invoice was at any time forwarded to *Nyren* and *Wilson*, and whether any other circumstance passed between you and them regarding the goods which may negative the claim by the assignees to recover them. We are," &c. To this letter there was the following P. S.: "Since writing the inclosed, the assignees have commenced their action by serving Messrs. *Betts* and *Drewe* with a writ. You will therefore give the matter your immediate attention." To this letter no answer was returned.

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10th November, 1831. The plaintiffs' attorneys wrote to the defendant, stating their surprise at having received no answer to their former letter, and informing him that as the assignees were proceeding with their action with all possible speed, they should shortly advise the plaintiffs to settle the action, and hold him answerable for the consequences.

17th November, 1831. The defendant wrote to the plaintiffs a letter, of which the following is the material part: "I have laid the whole case before my own solicitor, and, although I am advised that the action brought by *Nyren* and *Wilson*'s assignees cannot be successfully defended, I do not consider myself liable to you; but, from other reasons, I am willing to interpose on your behalf, and, in a reasonable time, to restore eight casks to your care."

19th November, 1831. The defendant shipped for the plaintiffs eight casks of acetate of lime, which were duly received by the plaintiffs in London.

On the receipt of the letter of 17th November, the plaintiffs offered to deliver to the assignees the eight casks so proposed to be substituted.

18th January, 1832. This offer was rejected.

On the same day, the plaintiffs forwarded to the defendant a copy of a letter from their attorneys stating that the assignees had decided upon rejecting the offer to substitute the eight casks, and recommending payment, for which purpose they requested an advance of money.

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21 January, 1832. This copy was accompanied by a letter from the plaintiffs to the defendant of this date, in which they write, "As we have acted entirely under your instruction in this transaction, we hope you will remit us or our attorneys the amount required immediately, as it seems worse than useless to defend the action or spend more money."

1st March, 1832(a). The plaintiffs, to avoid further expense, paid over the fair estimated value of the acetate of lime, and the costs of the action brought by the assignees, which, together with their own costs, amounted to the sum for which the verdict has been taken (157*l*.5*s*.); and they sent to the defendant an account of such payment.

23d January, 1832. The defendant wrote to the plaintiffs as follows: "We complied with your request against our interest, in sending you eight casks of acetate of lime. We decline doing more. We by no means regard you as acting under our instructions."

19th March, 1832,—and before the present action was commenced—the plaintiffs' attorneys gave the defendant notice of the plaintiffs' intention to commence an action against him if he did not remit the amount paid by them, and that the plaintiffs would, upon receiving the defendant's authority, sell the eight casks rejected by the assignees, and place the proceeds to his credit.

The defendant proved, under *Nyren and Wilson's* commission, a debt of 161*l*. 1*s*. 2*d*., being the price charged for the ten hogsheads originally sent; but such proof was made after the eight hogsheads had been received by the plaintiffs, and after the letter of 3d November, 1831, and before the present action was commenced, no application subsequent to the receipt by the plaintiffs of the eight

(a) This is a conjectural date, the day on which the action by the assignees was settled by the payment above-mentioned not being stated in the case; but it could not have been before the receipt of the letter of the 23rd January, 1832, or after the letter of 19th March.

casks having at that time been made by the plaintiffs to the defendant.

The question for the opinion of the Court is, whether the defendant is liable to repay to the plaintiffs the sum paid by them to the assignees, and also the costs of the said action.

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Chilton, for the plaintiffs. It will perhaps not be questioned but that the facts in this case raise an implied promise to indemnify, but the question will be, whether there is a *consideration* to support that promise. The point made at the trial by the attorney-general on the part of the defendant, and for which *Merryweather v. Nixan* (a) was cited, was this; that the refusal to deliver the casks to *Nyren* and *Wilson*, and the delivering of them to another person, were *tortious acts*, and could therefore not form a consideration for a promise to indemnify. In *Merryweather v. Nixan*, the distinction between contribution and indemnity is taken by Lord *Kenyon*, who expressly said that the decision in that case would not affect cases of *indemnity*, where one man employed another to do acts *not unlawful in themselves*, for the purpose of asserting a right. But apart from that consideration, the rule laid down by the attorney-general must be taken with considerable qualification, and must be confined to cases in which the party claiming to be indemnified *knew* that the act was tortious; and this qualification is indeed applied to the rule by Lord *Kenyon* himself, when he excepts "acts not unlawful in themselves for the purpose of asserting a right." [Lord *Denman*, C. J. The decision in *Merryweather v. Nixan* must, I think, have proceeded on the ground that there had been some *wilful* act of mischief done to the mill by the plaintiff and defendant. In *Adamson v. Jarvis* (b), *Best*, C. J. makes a distinction strongly in your favour (c), when he says that, from the inclination of the Court in *Philips v.*

(a) 8 T. R. 186.

(c) 4 Bingh. 72; and see *Lin-*(b) 4 Bingh. 66, 12; B. Moore, *gard v. Bromley*, 1 Ves. & Bea. 241. 114.

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Biggs(a), and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have *known* that he was doing an unlawful act.] *Fletcher v. Harcott*(b) is a direct authority in favour of the plaintiff. [Lord *Denman*, C. J. That case is not cited in the other cases, I think.] It certainly is not cited in *Adamson v. Jervis*. The case was this: the defendant having arrested one *Batersby* under a lawful authority, as he affirmed, requested the plaintiff to keep the prisoner in his inn during one night, and promised to indemnify. *Batersby* afterwards brought an action for a false imprisonment against the plaintiff, who spent 10*l.* in defending that action, and had since applied to the defendant to indemnify him, which he refused; upon motion in arrest of judgment, on the ground that the arrest not appearing to have been lawful, there was no consideration for the promise; the plaintiff had judgment. Lord *Hobart* makes the distinction between a promise to indemnify in consideration of a promise to do an act which is unlawful, as if one at the request of *J. S.* promised to *beat J. D.*, and the case of a promise to save a man harmless in consideration of his doing a thing which *may* be lawful, and the illegality whereof *appears not* to the party doing it. That case will perhaps be said to be distinguishable, on the ground that there was in that case an *express* promise—a distinction which is taken in a note to *Farebrother v. Ansley*(c), in which the learned reporter says, “When a person has been induced *ignorantly* to commit an illegal act, an *express* promise has been held to be valid (*Fletcher v. Harcott*, Hutt. 55). But an express promise to indem-

(a) *Hardres*. 164, and see *Allen v. Rescons*, 2 Lev. 174; Bull. N. P. 146.

(b) *Hutton*, 55. S. C. per nom. *Battersey's case*, Winch. 48.

(c) 1 Campb. 348, *infra*, 73. In that case not only was there no *express* promise, but none could be *implied* for want of privity.

nify a person against that which, from the nature of his office, he must be taken to have been conscious was against law, is void (*Martyn v. Blitheman*, Yelv. 197). I have not been able to find any case deciding how far a promise of indemnity will be *implied* where one ignorantly commits a trespass at the request of another." The *facts* of the case of *Martyn v. Blitheman* are such as entirely distinguish it from the present. Here, the plaintiffs dealt with the goods under the express command of the defendant, and under such circumstances that, from the cases decided upon the subject, it was at the least *doubtful* whether the defendant's right of stoppage in transitu was gone. If it was *doubtful* as matter of law whether that right was gone, and, consequently, whether the act of refusing to deliver the casks to *Nyren* and *Wilson* was wrongful, the consideration is good. The question really is merely this: did the plaintiff *know* that he was engaging to do an *unlawful* act? and it is clear upon the facts of this case, that the plaintiff was *ignorant* of the illegality of the act, even supposing that the act *was* illegal.

Waddington, contra. The right to stop in transitu was gone, and gone with the knowledge of the plaintiffs. Where goods are delivered by *A.* to *B.*, a wharfinger or carrier, for the purpose of being delivered to *C.*, a delivery of a part by *B.*, though not expressly in the name of the whole, puts an end to the right of stoppage in transitu on the part of *A.* Then the remaining question upon this part of the case is, did the plaintiffs *know* that the right of stoppage in transitu was gone? The facts were all within their knowledge; and the nature of the plaintiffs' employment was such, that they must be taken to have been cognizant of the legal result of the facts connected with these hogsheads. It was a breach of their duty as carriers to deliver the casks to any person but *Nyren* and *Wilson*. The Court will not under these circumstances imply a promise to indemnify.

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I. Even if there had been an *express* promise to indemnify, the plaintiffs could not have recovered upon it. The consideration would have been a promise to commit a breach of their *duty* as carriers, and would therefore have been a bad consideration. To support a promise to indemnify, not only must there be a consideration moving from the plaintiff, but that consideration must not be a contravention of law or public policy^(a) This is adopted by Mr. Serjeant *Williams* in his notes to *Saunders's Reports*^(b), and by other writers. In *Streether v. Horlock* ^(c), it is laid down that "whenever an order is given previously to the delivery of goods to a carrier or other parties, to deal with them when delivered in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to." [*Taunton, J.* No man can controvert your doctrine as a general proposition; but the question is, whether the person who delivers cannot *alter* the direction.] As between himself and the carrier, he certainly may. The consideration stated in the declaration is, the refusing to deliver goods to certain persons (whom the plaintiffs must have known to be entitled to them) and the delivering them to other persons. In *Pitcher v. Bailey* ^(d), it was decided that an officer guilty of a breach of duty could not recover money paid in consequence of it, though the breach of duty was committed at the request of the defendant, and the money paid for his benefit; *Marzetti v. Williams* ^(e).

II. A promise will not be *implied* under the circumstances of this case; for the parties must at any rate be considered as joint-tort-feasors, and between joint-tort-feasors there is no contribution. In *Fletcher v. Harcott* ^(f), it is perfectly clear that there was an *express* promise.

(a) 1 Selw. N. P. 7th ed. 59.

(b) 2 Wms. Saund. 137 e, note (b).

(c) 1 Bingh. 34.

(d) 8 East, 171.

(e) 1 Barnw. & Adol. 415.

(f) *Suprà*, 70.

[Lord *Denman*, C. J. That case is clearly no authority to shew that a promise may be *implied* under the circumstances of this case; for the declaration stated an express promise, and there had been a verdict.] In *Adamson v. Jarvis* (a) also, the motion was after verdict; and the declaration stated that the defendant had fraudulently represented to the plaintiff that he was entitled to sell certain goods of which he was possessed, and had requested the plaintiff to sell them for him, which he accordingly did, and paid the proceeds to the defendant, and that the lawful owner of the goods had subsequently brought an action against the plaintiff, and had recovered the value of the goods. That case could not be an authority here, unless in this case it had appeared that the defendant had *fraudulently* misrepresented facts, and in that way had induced the plaintiffs ignorantly to commit a breach of duty; in short, the jury should have found that this was a case of *fraud*. Undoubtedly some of the observations on the judgment are very strong, but some are in favour of the defendant, as others are against him; and besides, it may be doubted whether the Court would act upon all the dicta in that case. There are certain states of facts in which the law will not *imply* an indemnity, although an express promise to indemnify might be supported. In *Farebrother v. Ansley* (b), (which was an action by an auctioneer upon a supposed promise by a sheriff to indemnify the plaintiff from the consequences of a sale by him under a *fi. fa.*,) the plaintiff did not prove any express promise. “ Lord *Ellenborough*, soon after the plaintiff’s case was opened, expressed great doubts whether the action could be supported; as according to the case of *Merryweather v. Nixan*, there was no contribution among joint-wrong-doers, where there was a judgment against them jointly, and all the damages were levied against one of them; nor even supposing that the plaintiff had been *employed* by the defendants did it follow

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that they were bound to indemnify him, since a promise of indemnity was not to be *implied* if one man committed a trespass at the request of another." It is true that the decision did not ultimately turn upon this point. Now in that case there was no direct and positive act of trespass to which the observations could apply; for the facts were, that the goods having been taken in execution as the goods of the debtor, another person subsequently established his title to them in an action of trespass against the auctioneer. [Taunton, J. That was a mere passing impression of my Lord *Ellenborough*.] His lordship retained the opinion, and at a later period decided the case of *Wilson v. Milner*(a) upon it. In that case, the plaintiff, who was a bound bailiff to whom a warrant under a *fi. fa.*, sued out by the defendant, had been directed, executed it after an act of bankruptcy by the debtor, but before the issuing of a commission. The assignees recovered against the bailiff the value of the goods sold; and Lord *Ellenborough* held that the bailiff could not recover for money paid, for that "among joint-tort-feasors there is neither contribution nor *implied* promise of indemnity" (b),—though he decided that he might recover as for money had and received, on the ground that the money was paid by mistake. The circumstances of that case are stronger than those of the present case. No substantial distinction can be shewn between the joint-torts in the two cases. There is an old case of *Langdon, executor of Dickenson, v. The African Company and Dorkwray*(c), which shews that at the time when it was decided, the opinion was, that the remedy in such a case as this was in *equity* only.

III. The promise, if any can be implied, has been performed; and the plaintiff, by receiving the eight substituted casks, has waived his right to a complete indemnity. The plaintiffs themselves, by their letter of the 10th November,

(a) 2 Campb. 452.

(b) And see *Philips v. Biggs*,
Hardres, 164; F. N. B. 162 c, d.(c) 15 Vin. Abr. 316; Master
and Servant, (G), pl. 5; (citing Ch.
Prac. 221.)

point out this mode of indemnity; and their suggestions having been acted upon, they cannot now turn round and claim *another* indemnity.

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Chilton, in reply. First, with respect to the alleged *performance* of the promise to indemnify. The postscript to the letter of 10th November states that an action had been commenced against the now plaintiffs. It could not be supposed that they would then be content with having the eight casks restored to them.

Secondly, The decision in *Wilson v. Milner* could not have been otherwise than as it was. *Milner* had called upon the sheriff to take the goods of the debtor; but did not point them out; and the sheriff took the goods of the assignees instead of goods of the debtor. That case has no application here. In *Farebrother v. Ansley*, the conclusive answer to the action was, that the plaintiff had not been employed by the sheriff, but by the attorney of the judgment creditors and the bailiff. The words of Lord *Ellenborough*, which have been referred to, are the mere expressions of a *doubt*, and moreover only relate to a case of one person committing a trespass at the *request* of another. Here there was a direct *command*, and a command *implies* a representation on the part of the person giving it, that he has a right to give that command, and is calculated to induce the person to whom it is given to believe that he is under an obligation to obey.

Thirdly, There seems to be no ground for the distinction attempted to be made between promises express and promises implied. The difference between them is only in the mode of proof, and not in their effect when established. A promise, therefore, implied from circumstances is good when made under circumstances in which an express promise would be valid. *Fletcher v. Harcourt*(a) is a direct and unimpeachable authority for the plaintiff.

(a) *Supra*, 70.

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The delivery of part does not operate to put an end to the right to stop in transitu, unless the delivery be accompanied by something which shews an intention that it shall be considered as a virtual delivery of the whole. [*Taunton, J.* The converse of that is the correct way of putting it. The delivery of part is held to take away the right of stoppage in transitu, unless there be circumstances to shew that it was *not* intended to operate as a delivery of the whole.]

LORD DENMAN, C. J.—It appears to me that it is unnecessary to make the inquiry which Mr. *Chilton* has been latterly engaged in—an inquiry, perhaps, not very much for his benefit, because if these plaintiffs had a good defence in the action of trover which was brought against them by the assignees of *Nyren* and *Wilson*, it is possible to raise the argument that he ought to have defended it notwithstanding this correspondence. I do not mean to say that it is so, but an argument might be raised upon the subject. I think it immaterial, however, to enter upon that, because I think that if there was a *bonâ fide* doubt whether the right of stoppage had expired or not, the plaintiff had a right to detain the goods on the instructions of the defendant; and that having done so by his *desire*, he is entitled to be *indemnified* from the consequences of so doing.

Now supposing it to be a question of fact whether or not that promise was given, I have no doubt that if the defendant's letter had been laid before a jury, they would have said, that from such instructions as the defendant gave the plaintiff, a promise to indemnify *was* to be implied. Before the eight casks were taken away from the defendant's wharf, the brother of the defendant, acting on his behalf and with his authority, personally gave directions to the plaintiff not to deliver the remaining eight casks to *Nyren* and *Wilson*, but to deliver them to *John Elliott*, and signed an order of delivery to *Elliott*; so that the defendant

expressly gave an order to the plaintiff to deliver the goods to *John Elliott*. I think the jury would have said that, among commercial men, a promise of indemnity was implied. But supposing it to rest upon implication of law, I see no reason why the law should not imply that a party who gives an order to another undertakes to indemnify that other for any consequences brought upon him from his complying with that order, provided there be nothing in itself improper or illegal, in the contemplation of those two parties.

That case of *Merryweather v. Nixan* has certainly been very much overstrained, even beyond the decision; for Lord *Kenyon* seems to draw a distinction which may fairly include this case. The rule in that case is, that wrong-doers shall not have contribution from one another; and the exception is, that a party may, with respect to innocent acts, give an indemnity to another which shall be effectual, although the act, when it came to be questioned afterwards, would not be sustainable in a court of law against third persons who complained of it. That seems to be the only effect of that decision, and this case falls, I think, within the exception.

I must say I do not see the distinction between contribution and indemnity. I think if the one is prevented by any rule of law, so is the other; but I do not think, under such circumstances as these, that either would be prevented. I think it would be quite competent to the defendant to say "I claim those goods; I desire you to detain them for my use;" and though the facts might be brought to the knowledge of the plaintiffs, yet they were not bound to exercise their judgment as to what facts might be proved in an action by *Nyren* and *Wilson*, or what the result would be; and if they were acting *bonâ fide* on the defendant's representation and desire that the goods should be detained as his property, I cannot conceive what rule of law is to prevent them from recovering as upon a promise to indemnify, in case they should be

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damuified by reason of their so acting. *Farebrother v. Ansley* only shews Lord *Ellenborough's* first impression on this subject, in which he adverted to the general rule in *Merryweather v. Nixan*, without looking to the *exception*, under which, as it appears to me, this case falls.

The case of *Adamson v. Jarvis*, which is a case of seizure of goods by the sheriff, is of considerable importance, from the observations made in the course of the judgment, for they are made by a learned judge very familiar with commercial transactions, and who states that under such circumstances no sheriff would say "I require an express indemnity;" he would be perfectly justified in considering the nature of the transaction as implying one.

The case of *Fletcher v. Harcott* equally shews that there may be an indemnity given by one wrong-doer to another, and that the one may recover against that other, unless it appears that they were both jointly concerned in doing what the plaintiff knew to be illegal. Now whether the promise in that case was express or implied, is immaterial; for if principles of public policy prevent such a promise from being binding, it would be equally void in the one case as in the other, and the plaintiff could not have recovered in that action. In that action he did recover; and it seems to me to be a full authority for saying, that when one party induces another to do an act which cannot be supported, but which he may do without any breach of *bona fides*, or any desire to break the law, an action on an indemnity, either express or implied from the circumstances of the case, may be supported.

It seems to me, therefore, that in this case the plaintiff is entitled to recover.

TAUNTON, J.—I am of the same opinion. I accede to the case of *Merryweather v. Nixan*, because I think the law laid down there is too plain to be mistaken, viz. that where there are two *wrong-doers*, or tort-feasors, the law will not *imply* an indemnity; but I take it to be otherwise

where the matter to be done is apparently a matter altogether *innocent*, and where it must depend on *subsequent* circumstances whether the law will affirm it or not. It does not appear to me that that which was done here by changing the destination of the casks at the particular request and order of the defendant himself involved at that time any breach of law. If that be so, it does not come within the case of *Merryweather v. Nixan*. Besides, I observe that the letter of the defendant, at the time these hogsheads were originally received, is so worded, that the plaintiffs might well suppose that the defendant had a *right* to change the destination of the goods at any time before they had reached their ultimate destination. But that is not at all material; it strengthens me only in the agreement which I profess to have in the opinion of my lord chief justice—He has said every thing connected with the points of the case, and it is not in my power to add any thing material.

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PATTESON, J.—I am also of opinion that the plaintiff is entitled to recover on the facts of this particular case. It is not found in the case that there was any *express* undertaking; but I think if the whole of the facts had gone to a jury, it is not impossible that they would have found that there *was* such an undertaking.

It is said that the plaintiff and the defendant were both wrong-doers. Now it seems to me they are *not* both wrong-doers within the meaning of those cases which are referred to. Whether or not the right of stoppage in transitu was at an end, I do not think it material to determine. Perhaps if I were to go into the whole of the case, the inclination of my opinion would be to say it *was* determined; but I do not think it necessary to decide that; if there is the least *doubt* about it, that is sufficient for the plaintiffs' purpose. If the goods were in the hands of the plaintiffs under such circumstances that it was *doubtful* whether the defendant had a *right* to stop them in transitu, and he *desired* them to stop the goods in transitu, and the

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plaintiffs acquiesced in and acted upon that request, surely that would be abundantly sufficient (*a*) for the plaintiffs to maintain this action for indemnity. The parties are *not* wrong-doers within the *general sense of that term*; but a claim is made by one party, and resisted by others,—the plaintiffs were obliged to give up the goods to one party or the other, and they gave them up to one upon a promise of indemnity. That is a common thing done every day upon an *express* promise. Now the question is, whether there is an *implied* promise in this case; and I think the promise must and ought to be fairly implied, and if so the plaintiff is entitled to recover.

But then it is said that the plaintiffs have *waived* their right, because they have *taken* the eight substituted hogsheads. That argument was not very much pressed, and is not at all sustained by the facts of the case; for these hogsheads were sent by the defendant, not to be held by the plaintiffs in waiver of any right, but as the means of persuading *Nyren* and *Wilson's* assignees to take the eight hogsheads; they refuse to do so, and therefore that is at an end.

The defence is not a very honest one, and it appears to me to be perfectly wrong in point of law.

WILLIAMS, J.—I am of the same opinion. This is not like a case where a party seeks to be indemnified for the commission of an *obviously unlawful* act, as a breach of the peace, or any other act of that description, nor of an act against public policy. The defendant requests the plaintiffs to do an act which at that time was undoubtedly equivocal, because it has been made a matter of some argument to-day, whether they were or were not authorized in doing that act; but most certainly the act is so far doubtful, as that there was not the least resemblance between this and any which are of a *notoriously illegal* character. In pursuance of that order, and at that request, the goods are

(*a*) Vide *Longridge v. Dorville*, 2 Wms. Saund. 137 e. note (*b*); 5 Barn. & Ald. 117;—referred to in *ante*. 72.

so delivered; and it seems to me that there is nothing illegal in the contract (which I think must be implied) to indemnify, founded upon such a consideration.

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Postea to the plaintiff (a).

(a) And see *Parsons v. Brid-* F. N. B. 162 C. D.; Fitz Abr.,
dock, 2 Vern. 608; *Duffield v.* tit. *Pledges*, pl. 9; 5 Vin. Abr., tit.
Scott, 3 T. R. 374, 377; *Fisher v.* *Contribution*; Bac. Abr., tit. *Obligation* (D. 5); Cod. lib. 4, tit. 35,
Fallows, 5 Esp. N. P. C. 171; c. 2.
Wright v. Morley, 11 Ves. 12;

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EJECTMENT. At the trial before Lord Denman, C. J., at the last Bristol assizes, the principal question was, whether Colonel John Strode, under whose will the lessor of the plaintiff claimed, was seised in fee or for life only. The course of the evidence on the part of the plaintiff was as follows:—

December, 1806. Colonel John Strode devised all his real estate to the use of his nephew Thomas Chetham Strode for life, remainder to his issue; remainder to his nephew Richard Chetham Strode for life, remainder to his issue; remainder to his nephew Randle Chetham Strode (the lessor of the plaintiff) for life, remainder to his issue.

Thomas Chetham Strode and Richard Chetham Strode both died without issue before the commencement of the action, and the lessor of the plaintiff had become possessed of the bulk of the family property.

Colonel John Strode, from 1802, until his death in 1807, received rent in respect of the premises from Weekes (the defendant's testator.) The plaintiff then sought to prove that in 1796 Colonel John Strode made a lease for 21

Entries in a rent book made by the steward of a former owner through whom both parties claim, are admissible in evidence, though the party against whom they are produced does not claim under such owner.

A. an attorney is employed by the vendor and vendee to draw the conveyance, but another attorney peruses the draft for the vendee: Held, that A. could not produce the draft of the conveyance contrary to the wishes of a party claiming under the vendee.

ance contrary to the wishes of a party claiming under the vendee.

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years (a) to one *Thomas*, reserving the rent to himself, *his heirs*, and assigns, that in 1801, *Thomas* being dead, his personal representatives assigned the term to one *Hall*, who in 1802 assigned to *Weekes*. The plaintiff having entitled himself to give secondary evidence of the above facts, called upon Mr. *Palmer*, an attorney, to produce the draft of the deed of 1802, by which the term had been assigned by *Hall* to *Weekes*, and which deed recited the lease of 1796, and the mode of reservation of the rent. This draft had been prepared by *Palmer*, who was the attorney of *Hall*, but who was on this occasion employed and paid by *Hall* and *Weekes* jointly. *Osborne*, the attorney of *Weekes*, was employed by him to peruse the draft, and the draft was sent to him by *Palmer* and returned. *Palmer* did not object to produce the draft, but the defendant's counsel objected to his being allowed to do so, on the ground of privilege on the part of his client *Hall*. This objection was held good by the learned chief justice, who refused to allow the draft to be read.

The defendants, who were devisees of *Weekes*, contended that Colonel *John Strode* was tenant for life only; and they gave the following evidence:—

A.D. 1748. *James Strode* by his will devised his real property to his brother Colonel *Edward Strode* for 99 years if he should so long live, remainder to *Edward Strode* the eldest son of Colonel *Edward Strode* for life, remainder to his issue; remainder to Colonel *John Strode* for life, re-

(a) As this lease would no doubt be by *indenture*, and was probably executed by *Weekes*, the lessee, *Weekes*, and those claiming in privity with him, would be estopped during the term, from denying that the lessor had an estate to him and his *heirs*, agreeably to the redendum in the lease, (which operated as an *express* covenant on the part of *Weekes* and his assigns

so to pay.) But the term having expired in 1817, the estoppel was at an end before this action was commenced. *Vide ante*, 29, note (5).

After the determination of the lease the effect of the indenture would be no greater than if the demise had been to a total stranger, or as if (which is the same thing) no privity between *Weekes* and the defendant had been shewn.

mainder to his issue; remainder to the right heirs of Colonel *Edward Strode* (the father.)

Colonel *Edward Strode*, *Edward* (the son), and Colonel *John Strode*, were all dead; the first died before *James Strode*, and the two latter died without issue, after having each of them been successively in possession of the property. Colonel *Edward Strode* left also a daughter, who married *Thomas Chetham*, and had issue *Thomas Chetham Strode* and *Richard Chetham Strode*, (who died intestate in the years 1827 and 1828), and the lessor of the plaintiff.

28th and 29th September, 1813: *Thomas Chetham Strode*, by indentures of lease and release, conveyed the premises to *John Weekes* in fee.

Under this indenture the defendants,—who endeavoured to shew that the particular premises in question had belonged in the first instance to *Carew Strode*, had from him descended to *James Strode*, and had passed by the will of *James*,—claimed to be entitled to the fee. *Maskell*, a solicitor, to whom all the papers of the *Strode* family had been delivered by *Knatchbull* the administrator and acting trustee under the will of Colonel *John Strode*, and who had been employed by *Knatchbull*, and subsequently by *Thomas Chetham Strode*, *Richard Chetham Strode*, and the lessor of the plaintiff, to collect the rents of the *Strode* property, was called by the defendants to produce a book which he had found only a few days before, in which were certain entries favourable to their case made by the deceased steward of *Edward Strode*, the son, whilst he was in possession of the property devised to him for life by the will of *James Strode*. It was objected on the part of the plaintiff, that these entries could not be read as against him; but the learned chief justice admitted them. A clerk to the commissioners of the land tax also produced certain assessments, for the purpose of shewing in whose hands the property had at a former period been assessed. These assessments were received subject to an objection made on the part of the

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erly with-  
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plaintiff. Other evidence was given on the part of the defendants, and they obtained a verdict.

*Bompas*, Serjt., now moved for a new trial.

I. The drafts of the indentures of lease and release prepared in 1802, were improperly withheld. It was said at the trial that these deeds were the drafts of the *title deeds* of one of the parties in the suit, and that it would be a breach of professional confidence on the part of the attorney to produce these drafts. But the drafts were not a *communication* from the client to the attorney. They passed from the attorney of the one party to the attorney of the other. That which takes place between the two attorneys is not a communication from the client to the attorney; and it is *such* communications only that are privileged from disclosure. Mr. *Palmer* signed the draft as the attorney of *Hall*, and acted as *his* attorney throughout the business. In *Doe d. Courtail v. Thomas (a)*, where, by an order of the Court of Chancery made in a suit depending between the lessee and lessor, the lease was deposited in the hands of the lessor's attorney, "the lessee being at liberty to inspect the same," it was held that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title.

Second point.  
Steward's  
book improp-  
erly received.

II. The book kept by the steward of *Edward Strode* was improperly received in evidence. The parties who produced it were in truth the attorneys of the lessors of the plaintiff. This book came into the hands of the parties who produced it long before the death of *Thomas Strode*. Can it be said, that if a person purchases a small portion of a large family estate, in disputing the title with the same family, he can insist upon the reception of the steward's accounts in evidence? The book would go *with* the estate; and the party who holds it possesses it for the benefit of the person *entitled* to the estate. It would be a very dangerous doctrine to hold, that the family attorney

is not, after the death of the father, to hold the documents relating to the estate, for the benefit of the son. The lessor of the plaintiff does not claim *under Edward Strode*.

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III. The land-tax assessments were improperly received in evidence. In *Doe d. Stansbury v. Arkwright (a)*, it was held, that land-tax assessments are not evidence of seisin, it being shewn to be usual to retain the name of the deceased proprietors on the books, until the estate is sold to a different family. It was manifest in this case, by other parts of the evidence, that the land-tax assessments were incorrect. [*Patteson, J.* The land-tax assessments were only evidence, that a person of the name of *Strode* was the owner; but comparing the land-tax assessments with the steward's book, it appears *who* the proprietor was.]

Third point.  
Land-tax as-  
sessments im-  
properly re-  
ceived.

TAUNTON, J.—This application has been made upon several grounds—First, that the draft of the deed prepared by *Palmer*, was not permitted to be produced. It is said, that that was not a *privileged* deposit with *Palmer*. It is not necessary to say whether it was privileged or not, except in one respect. I have always understood it to be a clear rule of law, that a party is not bound to produce *any deed* in which he has an interest; and if he refuses to produce it, he is only exercising a power which the law gives him. It appears to me, that this deed, having been prepared by *Palmer*, for the vendor, as well as for the vendee, as the joint agent of both, each had an interest in it, and it could not be produced without the *consent* of both. The defendant's counsel, who represented the vendor, objected to its production. I think, therefore, that *Palmer* could not be compelled (b) to produce it. (c).

First point.

Second point.

(a) *Ante*, vol. i. 731.

the vendor.

(b) Or allowed so to do against the wish of those claiming under

(c) And see *Robson v. Kemp*,  
4 Esp. N. P. C. 233.

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steward's book was properly admitted? It seems to me, that it was properly admitted, for this reason—that here both parties claimed *under the same person*, whose book it was at the time when the entries were made in it; and that it came into the possession of the attorney from the same person *under whom* both parties equally claimed.

PATTESON, J.—This case is moved on the ground, first, of the rejection of certain evidence; and, secondly, the improper reception of certain other evidence.

First point.

With respect to the rejection of the draft, I confess I did for some time entertain some doubt about it, but on looking at the whole of the evidence, it seems to me to be quite clear that the draft of the lease never could have been in the possession of Mr. *Palmer*, as the attorney for the vendor, according to the ordinary course of business; for, generally it is not the vendor's, but the vendee's attorney who draws such an instrument. But it is said, that there was another attorney employed on the part of the purchaser. That is true; but that attorney's employment was, it seems, limited to *approving* the draft—not *drawing* it. There must have been an employment of *Palmer*, therefore, on the part of the purchaser, jointly with the vendor, to draw that instrument. If *Palmer* was so employed, though I admit the employment was a limited one, yet it referred to the very particular matter which was proposed to be given in evidence, viz., the preparing of the draft. *Palmer* had that draft as the agent for both parties, and though he kept it for his own security, still he must keep it subject to the rights of both the parties who originally employed him. The defendants, therefore, who claim under one of the persons who so employed him, namely, the purchaser, had a right to direct him to withhold the instrument. I do not mean to say, that if *Palmer* had been the vendor's attorney, and had not prepared the instrument of conveyance, he would not have been at

liberty to give *parol* evidence, from recollection, of what the document contained.

With respect to the reception of the steward's book, it is said that both the plaintiff and defendant did not claim *under* the same person, and that, therefore, the evidence was not properly received. It is true, in a certain sense of the word, that they did not both claim *under* the same person, but they both claimed *through* the same person, which, for this purpose, is precisely the same thing. According to the lessor of the plaintiff, this property belonged to *Edward* in fee, and, on his dying intestate, it passed to his eldest son, and ultimately to Colonel *Strode*, and from Colonel *Strode*, by his will, to the lessor of the plaintiff; therefore it is clear the lessor of the plaintiff claimed actually *under Edward*, whose book it was. On the other side, the claim is *not under Edward*, but the claim is *under James through Edward*, because *James's* will made *Edward* tenant for life; and whilst he was tenant, for life that book would be in *Edward's* possession, and afterwards it would come to Colonel *Strode*, the tenant for life, and afterwards ultimately to the lessor of the plaintiff. So that it is quite clear both these parties claimed *through Edward*, though they did not claim exactly *under* him. Now that being the case it seems to me, that the argument for the plaintiffs assumed, that the party requiring the production of this book and the reading of the entry, was a *stranger*. He was no stranger, but a party claiming under one of the family, and it is a question to whom that property belonged. It is the same thing exactly as if this defendant were *Thomas*, the elder brother of the lessor of the plaintiff—exactly so; could it be contended, then, that this book was not receivable in evidence on behalf of *Thomas*, the elder brother of the lessor of the plaintiff? I think not; and if he could give it in evidence, so could the defendant. I do not say, that the defendants have a right to the possession of the book; for it may be, and I dare say it is the case, that the book contains entries with

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Second point.

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- respect to other property, which the defendants do not claim.
- First point. WILLIAMS, J.—I am of the same opinion. It seems to me that the case cannot be put as it was by my brother *Bompas*, that *Palmer*, the attorney, was employed by the vendor alone, for it is perfectly clear that the purchaser had employed him to a certain extent.
- Second point. Upon the next point in the case, viz., the admission of the book, it seems to me, the objection has altogether proceeded on the ground, that the party who was desiring to have the benefit of the book in question was a mere stranger; but it does seem to me, undoubtedly, that both parties had an interest in the matter in question; and therefore it is not within the rule upon which the plaintiff's objection entirely proceeds.
- First point. LORD DENMAN, C. J.—With respect to the first point, I am still of opinion that the evidence was properly refused.
- Second point. With regard to the second point,—as to the improper admission of the steward's book, there was much said about the impropriety of handing over from a family what a steward might have obtained, or what an attorney might have obtained from him in relation to that family; but I must say, I think it would have been a gross act of fraud on the part of that family to wish to hold back from the purchaser of the land, the information which might be derived from the book as to the state of that property. If it related solely to that property, it is clear it ought to have been handed over to the purchaser, as a means of proving his title. If it contained entries with regard to other property, that is no reason whatever why the party should not be at liberty to prove in a court of justice, that the description of the property which he purchased, is contained (as appeared) in part of that book. The material question was, whether that property had come by will to the plain-



tiff's lessor, or whether it had been sold by *Thomas Chetham Strode*, and having shown it had been sold in point of fact, in the year 1813, to those under whom the defendants claimed, the question was, whether *Thomas Chetham Strode* sold it without title, or whether he had a title; and that depended on the comparison of a great number of facts and documents, not only old Bibles, but land-tax assessments and other things.

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Rule discharged.

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DEBT for 20*l.* for work and labour as an undertaker, and for materials supplied, &c. Plea: first, nil debet; secondly, that the debt in the declaration mentioned, if any, does not amount to 40*s.*, and that the defendant, before and at the time of the commencement of this suit, resided and still resides in the county of Middlesex; and that the defendant always, from the time of the accruing of the said supposed debt, hath been, and still is, liable to be summoned and warned in the County Court of Middlesex, within the true intent and meaning of the *statutes* in such case made and provided (*a*).

General demurrer, and joinder.

(*a*) This plea would appear to have been framed in accordance with the provisions, not of the Mid-

dlesex County Court Act, (23 *Geo.* 3, c. 33,) but of the Westminster Court of Requests Act, (23 *Geo.* 3,

Plea, in bar to an action of debt for 20*l.*, that the debt did not amount to 40*s.*, and that the defendant, before and at the commencement of the suit, resided and still resides in Middlesex, and from the time of the accruing of the debt was and still is liable to be summoned in the County Court of Middlesex:—

Held, that this plea was bad under the Middlesex County Court Act (23 *Geo.* 2, c. 33, s. 19,) for not negating that the freehold or title to land, or an act of bankruptcy, principally came in question.

*Seem*, that a plea in bar, containing such negative averments, would not be good under 23 *Geo.* 2, c. 33.

*Seem* also, that generally a plea in bar—that the debt is under 40*s.* and recoverable in a county court, could not be pleaded under the statute of Gloucester (6 *Edw.* 1, c. 8.)

An affidavit, stating the omission, by one of the parties, to deliver two copies of the paper-book to the judges, pursuant to Reg. 7, H. T. 1834, whereupon the adverse party delivered such copies, for which he has not been paid, will not entitle him to object to the adverse party's being heard, unless notice has been given of the intention to make such objection, so as to give such party an opportunity of answering the affidavit.

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*Steer*, for the plaintiff, objected (under the Rules of H. T. 1834, Reg. 7 (a),) to the defendant's being heard until he had paid for two copies of the demurrer book, delivered

c. 27,) which, by section 8, enables a defendant sued in a superior Court in an action of debt or assumpsit, in which the plaintiff declares for less than 40s., to plead generally in bar that at the time of commencing such action the defendant was inhabitant and resident within the city and liberty of Westminster or the part of the duchy of Lancaster adjoining thereto, and was liable to be warned and summoned before the Court of Requests for the said city and liberty, &c., without pleading any other matter specially: and in case the plaintiff in any such action shall declare for the sum of 40s. or above, the defendant may plead generally (over and above such matters as aforesaid) that he was not, at the time of commencing such action, indebted to the plaintiff in any sum or sums of money amounting to 40s., without pleading any other matter specially.

This statute and the Middlesex County Court Act, 28 Geo. 3, c. 33, were passed in the same session of parliament. The latter contains no clause authorizing a party to plead, in bar to an action in the superior Courts, that the cause of action was one for which he was liable to be summoned to the County Court. The only clauses in that act which refer in any manner to actions in the superior Courts are the 19th section, which is stated in the argument

above, and the 4th section, which provides "that no person shall be liable to be summoned to the said County Court at the suit of any plaintiff other than such persons as were liable to be summoned to the County Court of Middlesex before this act was made, and that this act shall not extend to give the said County Court any jurisdiction to hold plea of or to hear or determine any action, cause or suit, other than such action, cause or suit as the County Court of Middlesex might have held plea of by plaint before the making of this act." The circumstance of the plea in bar being expressly given in the Westminster Court of Requests Act, and wholly omitted in the Middlesex County Court Act, seems to be equivalent to a declaration, on the part of the legislature, that without an express enactment no such bar could be pleaded.

(a) *Regulæ Generales*, H. T. 1834, (*ante*, vol. iii. 13.) Rule 7: "Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two judges of the Court next in seniority; and in default thereof

by the plaintiff to the two puisne judges next in seniority after the senior puisne judge; the defendant having neglected to deliver such two copies pursuant to the rule of Court. He was furnished with an affidavit which stated the above facts, and that the defendant had not paid for the two copies.

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*Mansel*, for the defendant, stated that he was not aware of the facts, and that he believed there would have been no difficulty as to the payment; and the defendant's attorney (who was not then in Court) had notice of an intention to make this objection (*b*).

Lord DENMAN, C. J. (to *Steer*.)—We have only your affidavit, not seen by the other party. It might be contradicted. It is clear to me that you should have given notice to the other party, before the case came on for argument, of your intention to make this objection. You have had abundant time to give notice; and as you have not done so, the demurrer must be argued.

*Steer*, for the plaintiff, was then about to argue in support of the demurrer; but he was stopped by the Court, who called upon the counsel for the defendant to support the plea.

*Mansel*, for the defendant. The plea is good. The statute of Gloucester (6 *Edw.* 1), cap. 8, enacts, that no one shall have writs of trespass before justices unless he

by either party, the other party may, on the day following, deliver such copies as ought to have been delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules of the King's Bench and Ex-

chequer, or the secondary of the Common Pleas, as the case may be, a sufficient sum to pay for such copies."

(*b*) It afterwards appeared that two copies had been delivered by the defendant, though after the required time.

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affirm, upon his oath, that the goods carried away are worth 40s. at the least. Lord *Coke*, in his Reading upon this statute, in 2 Inst. 311, says, "Writs of *trespass* are here put but for an example, for debt, detinuc, covenant, and the like;" and afterwards he says, "As the inferior Courts, which are not of record, regularly cannot hold of debt &c., or damages, but *under* 40s., so the superior Courts, that are of record, *cannot hold plea* (a) of debt, &c., or damages, regularly, unless the sum *amount to* 40s. or above." In *Kennard v. Jones* (b) it was moved in this Court that the proceedings might be stayed, on the ground that the action was brought to recover a debt of less than 40s. The Court had some doubt, *Buller, J.* saying, that the practice had not been to grant such rules in this Court unless the demand appeared to be under 40s. *upon the record*; but Lord *Kenyon* saying, that he remembered many applications of that sort in the Exchequer (c), the Court granted a rule nisi, which they subsequently made absolute, Lord *Kenyon* saying, "This is a very general question, which concerns the practice of this Court, whether it shall be permitted to parties to sue in the superior Courts for such small sums as those under 40s. Now that is *expressly forbidden by act of parliament*; and therefore, upon consideration, we are of opinion that the rule should be made absolute." The statute to which his lordship referred, as expressly forbidding the bringing of actions in the superior Courts for debts under 40s., is the statute of Gloucester. Whatever is expressly forbidden by act of parliament may be *pleaded* in bar. The plea in the present case is framed with reference (d) to the Middlesex County

(a) Such incompetency, whether existing at common law or created by statute, would appear to be the subject of a plea in abatement to the jurisdiction of the court. *Vide Theloall*, 11b. 10, c. 29; *Doctrina Placitandi*, 234; 1 Wentw. 49. And see 1 Chit. Plead. 5th ed.

474; *Ibid.* note (b); *Tidd's Pract.* 9th ed. 960.

(b) 4 T. R. 496. And see *Stear v. Holmes*, 2 W. Bla. 754.

(c) A similar statement was made by the Court in *Wellington v. Arters*, 5 T. R. 64.

(d) *Vide ante*, 89 n.

Court Act (a), the defendant residing, as is alleged in the plea, within the jurisdiction of that Court. In other counties the question would have arisen upon the statute of Gloucester only. In Middlesex it must depend upon the combined effect of the *two* statutes. [*Patteson*, J. Neither of those statutes authorizes you to plead *in bar* of the action, that the debt is under 40s.] Not expressly, but by implication. The statute of Gloucester takes away the writ altogether; and the 19th section of 23 *Geo. 2*, c. 33, (which enacts that in case any action of debt or assumpsit be commenced in the superior Courts, and the defendant shall then reside in Middlesex, and be liable to be summoned to the said County Court, and the jury, upon the trial of such cause, shall find for the plaintiff for less than 40s. damages, the plaintiff shall have no costs, and the defendant shall have double costs, unless the judge shall certify that the freehold or title to land, or an act of bankruptcy, came principally in question,) does not abrogate the statute of Gloucester, but is cumulative only. If, as Lord *Kenyon* thought in *Kennard v. Jones*, the bringing of such an action in the superior Courts is expressly forbidden by the statute of Gloucester, it lies upon the plaintiff to shew that the rule has been abrogated, as to cases arising in Middlesex, by 23 *Geo. 3*, c. 33.

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*Steer* in reply. It is quite clear that unless there is some statute which provides that a party who has a claim for less than 40s. shall not maintain his action upon it in the superior Courts, he may do so of common right. The statute of *Gloucester* does not, in terms at least, say so; and the fact that there has never been such a plea, (as far as that can be collected from the books,) is a strong circumstance to shew that it has always been *considered* that a defendant cannot *plead* to the action that the debt is under 40s. The nature of the application in *Kennard v. Jones* of itself tends to shew that it was not thought that a *plea* that the debt was

(a) 23 *Geo. 2*, c. 33.

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under 40s. could have been put upon the record. That was an application to the Court to exercise a summary jurisdiction, by staying the proceedings (a). Undoubtedly, upon the authority of that case the Court might have *stayed the proceedings*. [*Taunton, J. Staying the proceedings, and sustaining a plea in bar, are very different things.*] 'The 25 Geo. 2, c. 33, shews that the legislature contemplated the positive right of the subject to sue his debtor in the superior Court for a debt under 40s., though it imposes a penalty upon him if he attempts to do so.

(a) Where it appears on the face of the declaration, (*Oulton v. Perry*, 3 Burr. 1592,) or it is admitted on the part of the plaintiff, (*Milton v. Garment*, 2 N. R. 84,) or proved by the affidavit of the defendant (*Wellington v. Arters*, 5 T. R. 64,) and not denied by the other party, (*Branker v. Massey*, 2 Price, 8,) that the debt sued for is under 40s., though reduced below that sum by payments on account, (Com. Dig. County, (C. 8.) Barnes, 353,) and recoverable in an inferior jurisdiction, (*Eames v. Williams*, 1 Dowl. & Ry. 359. But see ante, *Wright v. Nuttall*, 10 B. & C. 492, as to this restriction,) the Court will, on motion, stay the proceedings; it being beneath their dignity to proceed in such actions (2 Inst. 210, 211). But as the plaintiff cannot sue in the County Court, unless the whole cause of action has arisen (*Harwood v. Lester*, 3 Bos. & Pul. 617), and, as it is said, the defendant resides within the county, the action must be brought in the superior Court, where either of these circumstances fails, although the demand be for less than 40s. (*Tubb v. Woodward*, 6 T. R. 175; *Busby v. Fearon*, 8 T. R. 235.)

in which case, however, it seems that he would upon a judge's certifying, be entitled to no more costs than damages, (*Wright v. Nuttall*, 10 B. & C. 492.) In *Busby v. Fearon*, the Court of King's Bench refused to interfere, on the ground that the plaintiffs only resided in Middlesex, whereas the act creating the inferior Court limits its jurisdiction to causes where both parties resided within the district. But where the cause of action arises within the jurisdiction of an inferior Court, created by the common law, there appears to be no objection to proceeding there against a non-resident defendant, if he can be served with process, it was held, that the non-residence was such an obstacle as would justify the plaintiff in suing in the Courts at Westminster. In *Welsh v. Troyte*, 2 H. Bla. 29; and though it was there stated, *arguendo*, that an action was not maintainable in the County Court against a non-resident, the references (stat. Westminster 1, c. 35, 2 Inst. 229, 230, 231,) by no means support the position. And see M. 46 E. 3, fo. 30, pl. 28; *Wheeler v. —*, Freem. 468. See also H. 12 H. 4, fo. 17, pl. 15; Bro. Respond. pl. 12; Jenk. 57.

Supposing, however, that the defendant were entitled to plead in bar that the debt was under 40s., *this* plea is badly pleaded. It should have gone on to allege that the cause of action *accrued* within the jurisdiction of the Middlesex County Court, that no *freehold* or title to any *land* was in question, and that no question as to any act of bankruptcy could arise. These objections, it is submitted, are of themselves fatal, even supposing the facts to be in themselves pleadable.

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LORD DENMAN, C. J.—It seems to me to be quite unnecessary, in this case, to consider the effect of the statute of Gloucester. That statute says only that a man shall not have writs of *trespass* before justices, unless he swear that the goods carried away are worth more than 40s. Certainly, Lord Coke says, in the Second Institute, that this is put by way of *example* only, and that the superior Court cannot regularly hold plea of debt or damage, unless the *same* amount to 40s. or above. But even supposing that the effect which has been contended for were given to that statute, it is quite clear to me that it is repealed, *pro tanto*, by the 23 Geo. 2; for certainly the 19th section of that act implies that an action for less than 40s. debt or damages, may be brought in the superior Court (a). The plea is bad also for not negating that this is one of the cases excepted by the 19th section of 23 Geo. 2, c. 33. This is quite a novel plea.

TAUNTON, J.—No one ever heard of such a plea in bar as this. I certainly never heard or read of such a plea in bar. I do not mean to say that a statute's being old, or even obsolete, does away with the effect of its provisions. Where an attempt has been made to maintain an action in the superior Courts for a debt under 40s., the remedy has always been, as far as my experience goes, an application upon affidavits to *stay the proceedings*.

(a) *Vide supra*, 94 (a).

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But it is, however, sufficient to say in this case, that this is not a good plea, because there are certain excepted cases in which the action is maintainable, and, non constat, upon the face of this plea, but that this is one of those cases. The plea ought to have negatived that an act of bankruptcy or any title to land came in question.

PATTESON, J.—It is quite clear that the plaintiff is entitled to our judgment. No such plea in bar as this has ever been heard of, and I for one am unwilling to encourage any such novelty as this. This plea, however, does not at all point to the statute of Gloucester. It is quite obvious that it is a plea of the Middlesex County Court Act. I do not mean to say that if the plea were in other respects properly pleaded, it might not be open to a party to argue upon the statute of Gloucester that such a plea was pleadable in bar, though it certainly seems clear to me that it could not be pleaded, and that the Court is not ousted of its jurisdiction over debts of all amounts. But the plea is bad also, because it does not deny that this is one of the excepted cases.

WILLIAMS, J.—The proper course, supposing this to have been a case depending on the statute of Gloucester, would have been to move to stay the proceedings.

#### Judgment for the plaintiff.(a)

(a) Where a verdict was found for the plaintiff, in an action in K. B., against a party residing within the jurisdiction of the Westminster Court of Requests, this Court refused to allow a suggestion to be entered, to entitle the defendant to his costs, or to stay the proceedings, under 23

*Geo.* 2, cap. 27, the defendant having neglected either to plead the statute, or to take the objection at the trial, *Taylor v. Blair*, 3 T. R. 452, 1 East, 354, n.

And see *Mostyn v. Fabrigas*, 1 Cowp. 162, 172; *Parker v. Elding*, 1 East, 352; *Rex v. Johnson*, 6 East, 583.





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## The KING v. The Inhabitants of RAWDEN.

TWO justices, by an order, removed *Mary Oldfield*, widow of *Thomas Oldfield*, and their three children, from the township of Golcar, in the West Riding of Yorkshire, to the township of Rawden, in the same riding. Upon appeal, the sessions confirmed the order, subject to the opinion of this Court upon the following case:

The respondents set up a settlement by apprenticeship alleged to have been gained by *Thomas Oldfield*, in the appellant township. The indentures were not produced; but it was proved that they had been executed by *Thomas Oldfield* and his father and the master; and in order to prove the loss of the indentures, so as to let in parol evidence of the contents, the pauper was called by the respondents. She stated, that a short time before her husband died, and during the illness which terminated in his death, she had some conversation with him about the indentures. She was then asked by the respondents' counsel what that conversation was. This was objected to on the part of the appellants; but after argument by the counsel on each side, the Court decided that the evidence was admissible. She then stated, that she had asked her husband what had become of his indentures, when he said he had got them away from his master after the end of his apprenticeship, and had worn them in his pocket till they were all to pieces. Parol evidence was afterwards admitted of the contents; and residence in Rawden being proved, the sessions confirmed the order.

The question for the opinion of the Court is, whether the conversation stated by the pauper was admissible in evidence.

Upon a question whether a pauper was settled in *A.* by the apprenticeship of her deceased husband, it was proved that indentures of apprenticeship, which were not produced, had been executed by the husband, his father, and master. In order to prove the loss of the indentures so as to let in parol evidence of the contents, the pauper was called to prove a conversation with her husband shortly before his death respecting the indentures. Held, that such evidence was not admissible, it not having been proved that the indentures had ever been in the husband's possession, nor that inquiries had been made from the other parties to the indentures.

Where, upon a special case, it appeared that evidence had been received by the court of quarter sessions, which would not be admissible without a previous inquiry, not stated to have been made, the Court of King's Bench refused to presume that such inquiry had been made.

The Court also refused to send the case back to the sessions to be re-stated, in order that the omission of such a statement might be supplied.

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*Blackburne and Dundas*, in support of the order of sessions. Evidence of the conversation was admissible for the purpose for which it was given. It is true that it is not stated *in terms* that the indenture had been in the possession of *Thomas Oldfield*; but it is evident that it must have been proved that such was the *fact*; for otherwise the question put to the witness, as to the conversation, would not have been asked, nor would the sessions have admitted the conversation. [*Patteson, J.* It was not proved that inquiries had been made of the master, or that he was dead.] It follows almost as a necessary consequence, from the facts, that the pauper's husband must have had the possession of the indentures. The conversation when admitted was sufficient to obviate the necessity of all further search, so as to let in parol evidence of the contents of the indenture. *Rex v. Morton* (a) seems perfectly to resemble the present case in all material respects. *Rex v. Inhabitants of Denio* (b). If the Court should be of opinion that it is requisite that the fact of the pauper's husband having had the possession should be alleged, they will, it is hoped, send the case back to be *re-stated*.

LORD DENMAN, C. J.—If there is any thing incorrect in the statement of the case, it should have been altered before. We must decide upon the facts as they are brought before us by the case. It not being shewn that the instrument supposed to be lost had ever been in the possession of the party whose declarations respecting it are offered in evidence, we think it clear that the evidence is not admissible.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Order of Sessions quashed.

(a) 4 Maule & Sel. 48. (b) 7 Barn. & Cross. 620; 1 Mann. & Ry. 204.

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BOYD v. EMMERSON, HODGSON, and EMMERSON.

**ASSUMPSIT.** The first count stated that the defendants had been and were bankers, carrying on business at Sandwich, in Kent; that one *Robert Matson* had theretofore kept an account with them, and had been used and accustomed to deposit money with them as bankers; that on the 17th November, 1832, *Matson* drew a check, according to the usage and custom of merchants, on the defendants, requesting them to pay the plaintiff or bearer 597l. 11s. 6d.; that the check was delivered to the plaintiff; that on its being presented and shewn to the defendants for payment thereof, they, in consideration of the plaintiff's delivering up the check to them, promised to pay him the amount thereof; that the plaintiff did in consequence deliver up the check to the defendants; but that they did not nor would pay the amount. The second count stated

When a customer pays into his bankers, in the ordinary way, a check drawn upon them by another of their customers, the bankers are entitled to the same time for ascertaining whether the check will be paid, and giving notice of dishonor (in case it be resolved by them not to pay the check) as in the case

where the check is drawn upon other bankers. Therefore in such a case no promise to pay the check, on the part of the bankers, will be implied from the absence of earlier notice.

*A.* and *B.* are respectively customers of *C.* a banker. *A.* goes to *C.*'s bank at a quarter before one on Monday, and gives *C.*'s managing clerk directions as to the payment of a bill, and, whilst the clerk is making a memorandum of those directions, lays on the counter a check drawn by *B.* on *C.*, and says "place this to my account," or "credit." No intimation as to whether the check would or would not be paid was given by the clerk. The clerk did not debit *B.* with the amount, or place it to *A.*'s credit, or cancel the check. *B.* having overdrawn his account, inquiries were made on Tuesday, the result of which was, that *C.* resolved not to pay the check. The check, with notice of dishonor, was sent to *A.* at his residence, by seven o'clock, p. m. on Tuesday. Held, sufficient notice of dishonor.

*Seemle*, that as the post did not leave the town in which the bank was situate until seven o'clock, p. m., a notice of dishonor received by *A.* at his residence at a few miles distance, at seven o'clock, was earlier than necessary.


When a customer pays to his bankers a check drawn upon them by another customer, he must, in order to make them liable at all events, demand payment, or request that the amount may be placed to his credit.

An assent, on the part of the banker, to such a demand or request, would raise an implied promise to pay, or give credit for the amount.

*A.* and *B.* having a dispute as to the liability of *B.* to pay money to *A.*, agree to submit a case to a barrister, and to be bound by his opinion. *Seemle*, that in an action brought to enforce such payment, the opinion of a barrister upon a case so submitted is admissible in evidence without an award stamp.

*Seemle* also, that supposing an award stamp to be necessary, a stamp proportioned to the number of words on the opinion alone, without the case, is sufficient, although the opinion be annexed to the case, and refer to the case thus:—"Upon the facts stated I am of opinion, &c."

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in addition, that the plaintiff as well as *Matson* kept an account with the defendants; and laid the promise to be, that the defendants, in consideration that the plaintiff would deliver to them the check, promised to *allow and give credit* to the plaintiff for the amount thereof; and that the plaintiff did deliver the check to the defendants, but that they refused at any time to allow or give credit to the plaintiff for the same. The declaration also contained the money counts. Plea: the general issue.

At the trial at the Kent summer assizes 1833, before *Bayley*, B., a verdict was found for the plaintiff for 397*l.* 11*s.* 6*d.*, subject to the opinion of the Court on the following case:—

The plaintiff is a gentleman residing at Littlebourne, in Kent. *Matson* is a cornfactor residing at Wingham, in the same county. The defendants are bankers at Sandwich, in the same county (*a*).

Saturday, 17th November, 1832. *Matson*, who at that time owed the plaintiff upwards of 400*l.* for the price of corn, drew a check on the defendants (with whom he had for two or three years kept an account) by which he requested them to pay the plaintiff or bearer 397*l.* 11*s.* 6*d.* The plaintiff also kept an account with the defendants.

Sunday, 18th November. On the morning of this day *Matson* delivered to the plaintiff the check above mentioned.

Monday, 19th November. At about a quarter past one o'clock the plaintiff took the check to the defendants' bank, and gave directions to *Reader*, their cashier and the confidential clerk of the establishment, to provide for the payment of a bill made payable at their correspondents in London (*Glyn & Co.*) for 75*l.*, in the following month. Whilst *Reader* was making a memorandum of these directions, the plaintiff, laying the check on the counter, said,

(*a*) It was stated in the case submitted to Sir *J. Scarlett*, (*vide post*, 102,) that the defendant, *Hodgson*, had the sole management of the business of the bank.

"*place this to my account,*" or "*credit.*" No intimation was given to the plaintiff at the time, that this request *would or would not be complied with,* or that *Matson had overdrawn his account.* *Reader* knew at the time the check was presented that *Matson* was indebted to the bank in upwards of 1700*l.*; and he doubted whether the check would be honored by the defendants; but he knew it to be his duty, if cash was demanded for a check, to pay it; he also knew that *Matson* had been frequently permitted to overdraw his account. *Reader* expressly abstained, from motives of delicacy towards *Matson*, from disclosing either his doubts, or the state of the accounts, to the plaintiff.

A few minutes after the plaintiff left the banking house, *Reader* took the check up from the counter, but did not debit *Matson* or credit the plaintiff with the amount, or cancel the check. Other checks of *Matson's* on the defendants for about 1500*l.*, were received on the 18th from the Canterbury banks.

The defendant *Hodgson* was absent from Sandwich on the morning of the 19th, *but returned about five o'clock* in the afternoon of that day (the bank closing at four). The fact of the receipt of the checks was then communicated to him by *Reader*, and it was determined that *Reader* should go to Wingham before breakfast the next morning (Tuesday) to ascertain from *Matson* whether he had, as on former occasions, paid any money to their credit with their London correspondents.

Letters are delivered at Sandwich at eight in the morning, and the post leaves Sandwich at seven in the evening.

Tuesday, 20th November. *Reader* accordingly left Sandwich at seven in the morning, and arrived at Wingham at half-past eight, when he ascertained that *Matson* was expected to arrive at Canterbury from London the same morning at ten. *Reader* then proceeded to *Canterbury*; but not finding *Matson*, he returned to Sandwich at two. On the same day, *Hodgson* finding that no assets had been received to discharge the checks drawn by *Matson*, determined not to

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pay any of them, and sent a messenger to the two Canterbury banks and to Littlebourne, returning all the other checks to the Canterbury banks, and the check in question to the plaintiff, inclosed in the following letter:

"On my return home last night I found Mr. *Robert Matson's* check, which you had left with Mr. *Reader*, but not having effects in our hands to meet it; I sent over to Wingham this morning to see him; but unluckily he was from home in London, which for the present constrains me to return the check."

No previous intimation had been given to the plaintiff of the defendants' resolution not to pay the check.

A question whether the defendants had become liable to pay to the plaintiff the amount of the check arose, and it was agreed between the plaintiff and *Hodgson*, (on behalf of himself and the other defendants,) that the question of the liability should be decided by an opinion of counsel upon a case, embodying all the facts, to be fairly stated and approved of by both parties. A memorandum of agreement to that effect, stamped with a 1*l*. stamp, was signed by the plaintiff and *Hodgson*. A case was accordingly drawn and signed by the plaintiff and *Hodgson*, which case embodied all the facts, and stated that the plaintiff contended, that by his having presented the check on Monday the 19th at one o'clock, and directed the same to be placed to his credit, and not having any objection made to the check at the time, and the same not having reached him until seven o'clock in the evening of the following day—a period of thirty hours—the defendants had made themselves liable to pay the amount; and stated also that the defendants denied their liability on the ground that they were entitled to a reasonable time to ascertain whether assets would come to their hands to meet the same, and that they took no more than a reasonable time for that purpose (a). This case, which also contained an intimation that the parties

(a) Other points were also submitted for the opinion of Sir, J. Scarlett; but these do not relate to any of the questions raised by this special case.

had agreed to be bound by his opinion, was laid before Sir *James Scarlett*, who gave it as his opinion that "upon the facts submitted" to him, the defendants were not liable, they being entitled to the same time, for giving notice of the dishonor, as if the check of which they are the holders had been drawn upon and dishonored by any other bankers; and that the plaintiff had, in this instance, had *earlier* notice than in such a case would have been by the established rule of law required, for that, according to that rule, a letter giving notice *put into the post* on Tuesday evening would have been sufficient. This case, with the opinion subjoined, containing *together* more than 2160 words, the *opinion* containing less than that number of words, were produced in evidence, stamped with a 35s. stamp. No evidence was given to shew that the other defendants acquiesced in or were privy to the submission of the case to the opinion of counsel; and the plaintiff subsequently objected to the case, as not containing an accurate representation of the facts; and to the opinion, as being upon the face of it not consistent with law. It was proposed by the plaintiff's attorney to submit a further case, or to have an interview with Sir *James Scarlett*, both of which suggestions were declined. The question for the opinion of this Court is, whether the plaintiff is entitled to recover from the defendants the amount of the check.

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*Campbell*, A. G., for the plaintiff. The defendants are liable to pay to the plaintiff the amount of *Matson's* check. When the plaintiff desired that the check might be put to his credit, *Reader* said nothing; and the plaintiff, who knew that *Matson* had an account at the same bank, and who was not informed that *Matson* had overdrawn his account, must therefore have gone away with the reasonable belief that his account would be credited with the amount of the check. As regards the rights of the plaintiff, *Reader* must be considered as filling the place of *Hodgson*. If the check had been to be presented at another banker's it

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of notice of  
dishonor.

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might perhaps be held that notice on the Tuesday was sufficient. But here the check was given to the defendants as *principals*. The check was presented to them as the bankers of *Matson*; and when a banker has assets, he is bound to pay immediately; and when he has not assets, and intends not to pay the amount of the check, he is bound to give notice of that intention within a reasonable time after the presentment; *Marzetti v. Williams* (a), *Robson v. Bennett* (b), *Cocks v. Masterman* (c). The presentment in this case must be considered as a presentment *for payment*. The circumstance of *Matson's* having overdrawn his account, signifies nothing as between the plaintiff and the defendants; more especially as *Matson* had been allowed, on former occasions, to overdraw his account. The plaintiff was prejudiced by not having the notice on the Monday; for if notice had been given on that day, he might have arrested *Matson* on the Tuesday. There was undoubtedly no *express* promise to pay given by the defendants, but a promise may be *implied* from the acts of their agent, *Reader*.

Second point:  
Necessity for  
an award  
stamp.

II. The opinion given by the learned counsel, upon the case submitted to him, was in the nature of an award, and was not receivable in evidence without an award stamp [Lord *Denman*, C. J. There is no animus arbitrandi.] It is not necessary that the arbitrator should recite his power. [Lord *Denman*, C. J. Suppose a dispute had arisen upon a point of conveyancing, and it had been agreed to abide by the opinion, upon the point in dispute, which should be found to be expressed in a certain work on conveyancing—would such an opinion be an award?] The case suggested is distinguishable.

Third point:  
Whether the  
case is to be  
considered as  
part of the  
award.

III. Assuming that this was in the nature of an award, the 35s. stamp was insufficient for the opinion and case, which together contain more than 2160 words, and must be taken conjointly. The case is a matter *annexed* to the


(a) 1 Barn. &amp; Adol. 415.

(b) 2 Taunt. 358.

(c) 9 Barn. & Cress. 902; 4  
Mann. & Ryl. 676.



award within the meaning of 55 Geo. 3, c. 184, schedule B. (a), and therefore the opinion should have been stamped with the further progressive duty of 1*l.* 5*s.* for every 1080 words above the first 1080 words. [Taunton, J. Suppose a letter containing a statement of facts and requesting an answer to the case to be sent by the post, and an answer to be returned accordingly, would such letter be part of the award, so as to make an additional stamp requisite: that is, supposing the letter and award to contain together more than 2160 words?] That case does not arise. [Patterson, J. You cannot say that the case is *part* of the award. There is nothing *annexed* to the award.] Suppose an arbitrator made his award in this manner,—“under the above submission I make my award as follows:”—and the submission and award were pinned together, the submission would be a matter *annexed* to the award, within the meaning of the stamp act.

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IV. The award is not binding, because the agreement is not signed by the *Emmersons*, but only by *Hodgson*. The *Emmersons* would not have been liable in an action by *Boyd* upon the agreement, or upon an award made in pursuance of it; and if not bound by it, they cannot take advantage of it (b). One partner cannot bind his co-partner by a submission to arbitration, *Strangford v. Green* (c), *Stead v. Salt* (d).

Fourth point:  
 Authority of  
 partner to sub-  
 mit to arbitra-  
 tion.

*F. Pollock*, for the defendants.

I. The handing in of the check was *not* tantamount to a presentment for payment. It was merely a sending in of securities to the plaintiff's own bankers in the usual way.

(a) “Award in England, and award or decreet-arbitral in Scotland, 1*l.* 15*s.*.”

“And where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of words contained

therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*.”

(b) For which see *Ferrer v. Owen*, 1 Mann. & Ryl. 222; 7 Barn. & Cress. 427.

(c) 2 Mod. 227.

(d) 3 Bingh. 101; 10 B. Moore, 389, S.C.

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If the check had been sent by *post*, with directions to place it to the account of the holder, it could not be questioned but that the bankers would have been entitled to a reasonable time for inquiry and for consideration, before they gave notice that the check would not be paid. The course must be the same where the holder hands in the check *himself* with the same directions. The circumstance of the defendants being the bankers of both the holder and the drawer makes no difference. Suppose a man paid in to his bankers money securities, some of them checks upon the same bankers, some of them checks upon others, would not the rights and liabilities of the bankers be the same as to all equally? *Fernandey v. Glynn* (a) shews, that by the custom of London, where a check is presented expressly *for payment*, it may be retained by the bankers on whom it is drawn until five o'clock of the day on which it is so presented for payment, and then be returned if they have no funds of the drawer. If the plaintiff had wished to fix the bankers, he should have expressly said that he came for *payment* of the check, and then he would probably have been entitled to notice on the *same* day on which the check was presented.

Second point.

II. The next point is, that the opinion given in pursuance of the agreement of the parties was an *award*, and required a *stamp*, in order to make it admissible. It is believed that enough has already fallen from the Court to determine that point. [Lord *Denman*, C. J. The greatest difficulty in that part of your case is, as to the power of one partner to bind his co-partners by submission to arbitration.] The opinion of the learned barrister was not asked for as an award, nor was it given as such. He was called upon to give his *opinion* upon a point of law, and he gave it. His knowing that the parties intended to abide by it, does not give his opinion the character of an award. [Taunton, J. We have all of us given opinions by which, we were told, the parties intended to abide. I

(a) 1 Campb. 416.

never had any opinion of mine, given under such circumstances, stamped. It certainly is not the *practice*.]

III. But supposing that the opinion is in the nature of an award, the 1*l*. 16*s*. stamp is sufficient. The *opinion* only, and not the *case*, would constitute the *award*. If an arbitrator had taken down all the evidence, and had said "Upon the above evidence, I award, &c." would a stamp commensurate with the quantity of the whole matter, including the evidence, have been requisite? The word "annexed," which is found in the schedule of the stamp act, must be construed according to common understanding: If an arbitrator were to say "I award that *B.* shall have the property described in the paper annexed, and marked *X*.; and that *C.* shall have the property in the paper annexed, and marked *Y.*," then those two papers would have formed part of the award, as being matters *annexed* within the meaning of the act. Matter merely introductory and preceding, does not come within that meaning; otherwise, when an arbitrator made an award upon a bond of submission, and said "In pursuance of the annexed bond, I award, &c.;" it would be requisite, in calculating what stamp was necessary, to count the number of words in the bond; a thing which can never have been intended.

IV. This opinion is binding on all parties. There is no case that touches the present question, which is therefore *res integra* before the Court. This is the case of a *general partnership*, and of a dispute arising with respect to partnership matters. In such a case it is believed that one partner *may* submit the partnership rights to arbitration. One partner may bring an *action* in the name of all, and may *settle* an action brought against the partnership. What reason then can there be, why he should not bind his partners also by submission to *arbitration*? It is not unreasonable, neither is it unusual. *Strangford v. Green* was the case of an arbitration *bond* being entered into by one partner, for himself and his co-partners; and the ground upon which the Court decided was, that


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one partner cannot bind another by *deed*. In *Stead v. Salt*, the parties were *not general partners*. There was no ground in that case for supposing that the two partners who did not sign the articles of agreement, intended that the three who did sign should execute for them. There is also this difference between *Stead v. Salt*, and the present case,—that in this case, the reference is of a matter of *opinion*, within the general scope of the authority of an individual partner, with respect to the partnership affairs; whereas on the former, the reference was on a more *enlarged* description. In the present case there was no regular reference to *arbitration*. It would be exceedingly injurious to a very useful and frequent practice, if any doubt were thrown upon the power of one partner to bind his co-partner in this way.

*Campbell, A. G.*, in reply.

First point.

I. Even if the check had been sent to the defendants in a letter containing a request that it should be put to the plaintiff's account, and it had been received by the defendants at a quarter before one o'clock on the Monday, they would have been bound to give notice on the same day. But it is not necessary to go that length, for in the case before the Court, the plaintiff went *in person*, so that the defendants had an opportunity of objecting *at once* to pay the check. There can be no doubt that an express promise by *Reader* would have bound the defendants. Here there was a *request* by the plaintiff, and *silence* on the part of *Reader*, the effect of which must have been to make the plaintiff leave the bank as fully convinced that the check *would* be paid, as he would have been if an *express* promise had been given. *Fernandey v. Glynn* shews, that where a check is not returned by five o'clock, a promise to pay will be implied.

Second point.

II. This is an *award* within the meaning of the stamp act. It may not be the *practice*, as Mr Justice *Taunton* has observed, to stamp *opinions* by which the parties have agreed

to be bound; but unless it be so stamped it cannot be given in *evidence*.

III. If it had been intended to include in the calculation of the number of words, only such matters annexed as are strictly speaking *a part of the award*, the words "together with any schedule, or other matter put or indorsed thereon, or annexed thereto," need not have been added. If an award were to refer to an annexed statement of the evidence, that statement would be a matter *annexed* to the award, within the meaning of the act.

IV. The authorities upon this point have not been met. Fourth point. The decision in *Strangford v. Green* did not proceed upon the facts of the submission being *by bond*, but upon the ground that one partner cannot bind another by submission to *arbitration*. The circumstance that in *Stead v. Salt* there was not a *general* partnership, is not material; for the matters referred were partnership matters. One partner, it is true, has power to bring an *action* for himself and his partners, but then the rights of the partnership are to be decided upon by the regular tribunals of justice.

Lord DENMAN, C. J.—It does not appear to me to be necessary to give any opinion upon the second, third, and fourth points raised,—because it seems to me, that according to the facts submitted to us, and from which we are to draw such inference as we think it reasonable to draw, the plaintiff has not proved his declaration. It seems to me that it is not *true*, as stated in the first and second counts, "that in consideration of the plaintiff's delivering up a check to the defendants, the defendants *promised to pay* the amount thereof." If that had been proved, undoubtedly the defendants would have been bound to pay the amount. But, on the contrary, it seems to me that what passed on the occasion when the check was left with *Reader*, is at least equivocal; because it is found that—[His lordship here read from the special case the facts there stated relative to the presentment of the check.] It seems to me that if the

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plaintiff had presented the check for *payment* he ought to have said so. If he had said either "cash that check," or "give me credit for the amount in my account," he must have drawn from *Reader* a distinct answer, whether he would take it on those terms or not; but when he lays it on the desk, and requests that it may be placed to his account, it appears to me that it must be taken to his account on the same terms upon which any other bill would be taken, and subject to all the contingencies that all other bills are liable to; and that if he receives a regular notice of the dishonor of the bill, he has no ground of complaint against the bankers. Now it strikes me, as I see it struck the learned counsel whose opinion was asked, that the notice of dishonor, instead of coming *too late*, came *sooner* than the plaintiff had a right to expect; for on the evening of the same day on which it was decided that the bill would not be available, the plaintiff received notice of that fact. I think he would have had no right to complain if the notice had not reached him until the next morning. I will just advert to the case of *Kilsby v. Williams*(a), in which much was said by the Court which might seem to favour the plaintiff's view; but Mr. Justice *Bayley* seems to me to put that case on a ground which is decisive of this(b). In this case, the plaintiff being a customer of the defendants, was bound to give them to understand distinctly, in what character he paid in that bill, whether he required them to consider it as a sum of money paid into his account, or his credit, or whether he required them to take it as a bill, and deal with it as any other bill might be dealt with. I draw the inference from these facts, that they received it in the latter character, and I do not apprehend, nor is the fact found, that he left the banking-house with the expectation that he should receive value for it. If that had been so, it ought to have been found as a fact, but it is a fact which I think is inconsistent with those which are laid before us.

(a) 5 Barn. & Ald. 815.

(b) *Ib.* 820.

In my opinion, therefore, the defendants are entitled to our judgment.

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TAUNTON, J.—I am of the same opinion. There is no express evidence to sustain the promises laid in the first two counts of the declaration; and I do not think there are any circumstances in the case from which such promises can be implied. It appears to me also that the defendants gave as early notice of the dishonor as they were bound to give, and as early notice as they could give of their intention not to pay the check. It appears that at the time it was paid in, *Hodgson*, the managing partner, was out of the town in which the business of the firm was carried on, but he returned in the afternoon of the same day, and as soon as he found what had taken place in his absence, the clerk (*Reader*) was dispatched to the place where the drawer of the check resided, to inquire into his circumstances, in order to furnish some grounds upon which *Hodgson* might determine whether he would pay the check or not; and from the information the clerk brought back (what it was, does not signify), *Hodgson* determined within himself not to pay the check, and he forthwith sent off the earliest notice that could be transmitted to the plaintiff, that the check would not be paid. It does not appear to me, therefore, that there was any such laches or negligence on the part of the defendants, in giving notice to the plaintiff, as to make this a case in which it can be properly considered that they have made the check their own, and were bound at all events to pay it. I think therefore, upon this ground, that judgment must be given for the defendants.

Upon the other points I am very glad to be relieved from giving any other opinion than this—that I am very sorry that the plaintiff, who appears to be a person in a respectable walk of life, should resort to such miserable shifts.

PATTERSON, J.—I am also of opinion that the defendants

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therefore, that all that was required of the defendants was done, and that they are, therefore, entitled to the judgment of the Court.

I say nothing on the other two points which have been discussed, but that I feel very much with my brother *Taunton* upon the subject.

Judgment for the defendants.

GEORGE WAKEMAN v, ANN SUTTON.

Where, to a declaration on a special promise to answer for the debt of a third person, it is pleaded that there was no memorandum in writing signed by the defendant or his agent, a replication alleging that there was such a memorandum, without setting it out, was held good on special demurrer.

**ASSUMPSIT.** The declaration stated, that on 24th May, 1827, in consideration that the plaintiff, at the request of the defendant, would, for the accommodation of *Thomas Sutton & Co.*, accept a certain bill of exchange, drawn on the 14th May in the same year, by *T. Sutton & Co.* on the plaintiff, requiring the plaintiff, twelve months after date, to pay to *T. and T. Billings* 420*l.* 10*s.*, the defendant promised the plaintiff to pay him 420*l.* 10*s.* on 17th May, 1828, which day has long since passed; that the plaintiff did accept the bill for the accommodation of *T. Sutton & Co.*, whereof the defendant had notice, but that the defendant did not, nor would, on 17th May, 1828, or at any other time, pay the plaintiff 420*l.* 10*s.*, but has hitherto refused so to do, although the plaintiff hath been obliged to take up the bill, and hath not been paid the amount thereof by *T. Sutton & Co.* or any other person, or been indemnified by any person on account of his acceptance and payment of the bill.

Second count: that in consideration that the plaintiff, at the request of the defendant, had lent to *T. Sutton & Co.* his acceptance of another bill of exchange for 420*l.* 10*s.* due 17th May, 1828, the defendant, on 24th May, 1827, by a certain memorandum of agreement in writing, signed by her, engaged to pay the plaintiff



420*l.* 10*s.* on 17th May, 1828; that the defendant, in consideration of the premises, promised to pay accordingly; yet the defendant did not, nor would, on 17th May, 1828, or at any other time, pay the plaintiff 420*l.* 10*s.*, but hath refused so to do, although &c. *ut supra*.


The declaration also contained the money counts, and a count upon an account stated.

Pleas: first, non assumpsit. Secondly, that the supposed promise of the defendant in the first count mentioned, was a special promise to answer for the default of other persons, to wit, the said *Thomas Sutton & Co.*, and that there was no agreement of or relating to the supposed cause of action in that count mentioned, nor any memorandum or note thereof stating the consideration for the supposed promise of the defendant, in writing, signed by the defendant, or by any person thereunto by her lawfully authorized. Thirdly, as to the second count of the declaration, a plea similar to the second, except that before, and in addition to, the averment above set out, it was averred—that the memorandum of agreement in the second count mentioned does not state the *consideration* for the supposed promise.

The replication joined issue on the first plea; and as to the second plea, alleged that at the time of the making of the promise of the defendant mentioned in the first count, a memorandum of agreement in writing, relating to the supposed cause of action in that count mentioned, was signed by the said defendant. And as to the third plea, it alleged that the memorandum of agreement, in the second count mentioned, does state the consideration for the promise of the defendant in that count mentioned.

To the replication to the second plea the defendant demurred, and assigned as causes of demurrer, that the replication did not *set out* the memorandum of agreement; and that in the manner and form in which it was pleaded, it precluded the defendant from submitting the sufficiency of the memorandum of agreement to the opinion of the Court, and attempted to compel the defendant to refer as well the

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sufficiency of such memorandum, as the existence thereof, to be tried by the country. And also, that the replication attempted to put in issue matter of law; and also for that no certain or sufficient issue could be taken on the replication, and that it was argumentative, and in other respects defective.

Demurrer to the replication to the third plea, assigning substantially the same causes of demurrer.

Joinder in demurrer.

*R. V. Richards*, in support of the demurrer, cited *Lowe v. Eldred* (a). [*Patteson, J.* There is also a case in *Price's Reports* (b).]

*Wightman*, in support of the replications, stated that that case had been overruled by *Lysaght v. Walker* (c).

The COURT were of opinion that the plaintiff was entitled to judgment, but gave the defendant leave to amend, upon the usual terms.

Leave to the defendant to amend, on payment of costs.

(a) 1 Crompt. & Mees. 239.

(b) *Lilley v. Hewitt*, 11 Price's R. 494. In this case the Court said that no person had before ventured to plead non-compliance with the statute of frauds, and held the plea to be bad on general demurrer. The defendant having succeeded on the general issue, the special pleadings became immaterial, and

no writ of error was brought. In *Maggs v. Ames*, 4 Bingh. 470, and 1 Moore & Payne, 294, the Court of C. P. held such a plea to be good; and as to the supposed novelty of the plea, see *Reed v. Nash*, 2 Wentw. Plead. 444, 3 Wentw. 102, and 1 Wils. 305.

(c) 5 Bligh. 1, new series.



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## The KING v. The Inhabitants of IKEN.

**SARAH CHAMBERS**, widow, and her two children, were, by an order of two justices of the county of Suffolk, removed from Iken to Frostenden. Upon appeal, the sessions quashed the order, subject to the opinion of this Court upon a case, which, coming on to be argued in last Easter term, was by the Court sent back to the sessions to be re-stated. The appeal was in consequence re-heard by the sessions, and the following amended case was returned to the Court :

In 1813, *George Chambers*, being at that time a married man and settled in Frostenden, went into the service of *Samuel Barnes*, of Iken, as a potmaker. *Barnes* rented a considerable farm in the parishes of Iken and Sudbourn, including a pot-kiln and sheds in Iken, the site of which, with the yards thereto belonging, was between a quarter and half an acre of land. *Chambers* was to make and burn pots; to do which he was to have the use of the kiln, sheds, and yards. *Barnes* was to keep the kiln and sheds in repair, to furnish and cart all the clay wanted, and horses to grind it twice; and to find red lead, with whins and coals for burning the pots. *Chambers* was to receive 25 per cent. on the sale of the pots, for making and burning them. *Barnes* was to receive 25 per cent. for the use of the kiln, sheds, and yards, and preparing and carting the clay, and also for carting out the ware when sold. Another 25 per cent. was to be applied for coals, whins, and red lead; and the remaining 25 per cent. was allowed to shopkeepers for selling the goods. *Chambers* resided in a cottage in Iken, which he rented of *Barnes* for three guineas a year, and worked the kiln till 1815, when *Barnes*, being dissatisfied with the ware made by *Chambers*, put an end to the foregoing agreement without notice; and the parties agreed as follows :

*A.* having originally entered into the service of *B.*, the owner of a kiln, yard, and sheds, as a maker of pots, an agreement was subsequently entered into, by which *A.* was to pay *B.* 6*l.* after each burning for the use of the kiln, &c. and for furnishing and preparing the clay, and for carting the clay and pots, and was to do as he pleased with the ware. *A.* occupied for more than a year, and his occupation was worth more than 10*l.* a year:—Held, that he gained a settlement.

“The average number of kilns burnt during the year

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the premises. The relation of landlord and tenant must strictly subsist. Where the occupation is connected with a service, and in any manner depends upon the continuation of the service, no settlement is gained by it. *Rex v. Cheshunt (a), Rex v. Langreville (b), Rex v. Bowness (c), Rex v. Seacroft (d), Rex v. Hammersmith (e), Rex v. Doddhill (f)*. It cannot be said that in this case *Chambers* occupied the kiln, &c. as tenant. The case finds that in 1813 he entered the service of *Barnes* as a potmaker, and that for the purpose of making and burning the pots, he was to have the use of the sheds and kiln; that *Barnes* was to have one fourth of the proceeds of the sale of pots, for the use of the kiln and sheds; that *Chambers* resided in a cottage in Iken, which he rented of *Barnes*, and worked the kiln till 1815; that *Barnes*, being dissatisfied with *Chambers*, then put an end to this agreement without notice; and that the parties, after calculating the average produce of the kiln, entered into a second agreement, by which it was agreed that *Chambers* should pay *Barnes* 6*l.* after each burning for the use of the kiln, &c. and for furnishing, carting and grinding the clay, and carting the ware out when sold. *Chambers* continued to reside in the cottage at the same rent, and worked the kiln under this second agreement until his death in 1828. It was evidently not the intention to find an independent tenancy of any thing but the cottage. There is no certain rent reserved for the premises, for which *Barnes* could have distrained if *Chambers* had neglected to pay it; but only an agreement that *Chambers* should pay 6*l.* after each burning, for the privilege of using the kiln and for other considerations. There can be little doubt but that *Barnes* could have put an end to the second agreement if he had been dissatisfied—with *Chambers's* manner of using the kiln, for instance—in the same manner

(a) 1 Barn. & Alders. 473.

(b) 10 Barn. & Cressw. 901.

(c) 4 Maule & Selw. 210.

(d) 2 Maule & Selw. 472.

(e) 8 T. R. 450, n.

(f) 8 T. R. 449.

as he did to the first. There was no difference between the two agreements except as to the mode of paying for the use of the kiln.

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LORD DENMAN, C. J.—The question is, whether, under the *second* agreement, *Chambers* gained a settlement. It appears to me that he did. It is contended that the occupation was ancillary to a *service*; but it appears to me that it was an independent holding, and that *Chambers* was not, under the second agreement, subject to be turned away at the will of *Barnes*, who, as it is stated, had *originally* hired him as a servant. I think it doubtful whether or not a settlement was gained by the occupation under the first agreement. It is said that *Barnes* put an end to it without notice; but that does not explain the agreement. But whatever may be the effect of the first agreement, it is immaterial to consider it; for the second agreement is entirely independent of it. *Rex v. Seacroft* (a) perhaps affords the best illustration of the principle which governs all those cases in which the occupation has been held not to confer a settlement, on the ground that it was connected with a *service*. There, the waiter held the tap as connected with his service of waiter to a tavern. There is no similar statement here.

TAUNTON, J.—I am entirely of the same opinion. I should pause before I said that a settlement was gained under the *first* agreement. The second agreement, however, as I think, superseded the first. Whatever my opinion might be upon the first agreement, upon the second I think that the decision of the sessions ought to be confirmed. Under the second agreement *Chambers* was to pay *Barnes* 6*l.* after each burning, for the use of the kiln, &c. (which, together with the cottage, were, as the sessions find, worth more than 10*l.* a year,) and he was to have the property in the article manufactured. The principal object of

(a) *Supra*, 120.

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this agreement was, that *Chambers* should have the use of the kiln, &c. for the purpose of making pots for his own benefit. There was no contract of hiring and service. With *Rex v. Cheshunt*, *Rex v. Langreville*, *Rex v. Bowness*, and *Rex v. Seacroft*, I perfectly agree. *Rex v. Hammer-smith* is the strongest case against the settlement. There the counsel who was to have argued the case gave up the point. The only ground upon which that case could have been decided, if properly decided, was, that the use of the meadow was *ancillary* to the contract for grinding, and was not a *letting* of the land. As to *Rex v. Seacroft*, it is altogether distinguishable from this. The person who was held not to have gained a settlement by the occupation of the tap, went into the service of the tavern-keeper expressly as *waiter*, and it was clearly never intended that he should hold as *tenant*. In the larger inns the waiter has very commonly the privilege of taking the profits of the tap on certain terms; but this is a *privilege* only in respect of the principal thing, which is the hiring himself as a waiter. Here, the *principal* object was to enable *Chambers* to manufacture pots. That he could not do without having the use and occupation of the kilns; and therefore that was given to him for the purpose.

PATTESON, J.—I also think that the order of sessions must be confirmed. This opinion I ground entirely upon the *second* agreement. We are not called upon to decide as to the effect of the first,—upon which, perhaps, a difficult question might have arisen. Under the second agreement there is nothing to shew that the relation of master and servant was to exist: indeed, the existence of such a relation is quite inconsistent with the terms of the agreement. *Chambers* was to do quite as he pleased with respect to the manufacture of pots; and was to pay 6*l.* after each burning, by way of rent. His occupation the sessions have found to have been worth 10*l.* a year. I have no difficulty whatever as to any of the cases cited except that of *Rex v. Hammer-*

*smith*, which is very loosely reported. I confess that I cannot at all understand the ground upon which the case proceeded. I think there must be something omitted in the report. In *this* case I am clear that the relation of landlord and tenant existed, and that therefore a settlement was gained.

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WILLIAMS, J.—I am of the same opinion. Under the first agreement, it is possible that the occupation might be referred to the service. The second agreement puts an end to the first; and, under the second agreement I see nothing which can make the occupation—found to be of the yearly value of 10*l.*—referable to any service.

Order of Sessions confirmed.

#### ATKINS and SHORT v. OWEN.

ASSUMPSIT for money had and received, tried before Lord Denman, C. J. at the last assizes for the county of Devon. A Mr. Study had borrowed 150*l.* of the plaintiffs, who were trustees under his marriage settlement. Study had property in Newfoundland, the rents of which were from time to time remitted in Newfoundland bills payable to his order, and which were sent to Mr. Vallance, of Torquay, on his account. Study wrote to Vallance, requesting him, out of his Newfoundland rents, to pay the In assumpsit for money had and received, where it is shewn that the defendant admitted that he had received a bill drawn on a third party, to which the plaintiff was entitled, and that he had paid it into his banker's on his own account, the banker's clerk cannot be called to prove that the defendant received benefit from a bill of a similar description, the bill itself not being produced, nor its absence accounted for.

Credit given to the holder of a bill, by the party ultimately liable, is tantamount to payment.

Secus, as to credit given by a party not ultimately liable, as where the credit was given by the banker of the holder, such banker not being the party to the bill.—Per Patteson, J.

Where a plaintiff had been nonsuited on the ground of the non-production of a bill of exchange, the Court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the Court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession.

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150*l.*, and *Vallance* subsequently receiving two bills from Newfoundland for the payment of 100*l.* and 47*l.* 10*s.* respectively to the order of *Study*, sent them to the plaintiffs. The bill for 100*l.* was given by the plaintiffs to Mrs. *Study*, and by her to the defendant, at whose house she and her husband then resided, for the purpose of *the defendant's* procuring the indorsement of *Study*. The bill having been so indorsed, the defendant set up a claim to it, and (as he had admitted) paid it into his banker's, on his own account. The bill was not produced at the trial, but in order to prove the payment, so as to charge the defendant with having received money to the use of the plaintiffs, the banker's clerk was called, and proved that a bill for 100*l.*, answering to the description of the bill above mentioned, had been paid in by the defendant, and that credit had been given him in the banker's books. A question was then put to the witness for the purpose of ascertaining whether the bill had ever been dishonored, and the defendant in consequence *debited* with the amount. This question was objected to, and the lord chief justice thinking that, in order to entitle the plaintiffs to give evidence of the defendant's having received a benefit from the bill, the bill should be produced, refused to allow the question to be put; and upon the non-production of the bill, nonsuited the plaintiff.

*Follett* now moved for a new trial. The plaintiffs' counsel was entitled to put that question to the witness. The admission by the defendant that he had received the bill from Mrs. *Study*, and had paid it into his banker's, dispensed with the necessity of producing it. The banker's clerk *did* prove that *credit* had been given to the defendant for the bill; and that evidence, without proof of the payment of the bill, is sufficient to entitle the plaintiffs to maintain their action. The question put to the witness was allowable for the purpose of shewing that the defendant had always continued to have credit for the bill. [*Pat-*



teson, J. There is a case of *Gillard v. Wise* (a) in which it was held that where a party receives credit for a bill from the persons *ultimately liable*, that is tantamount to payment. But this is not the case of credit given by the persons *ultimately liable*, but by intermediate persons.]

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Lord DENMAN, C. J.—It appeared to me at the trial, and it seems to me still, that the only thing to connect the parties with the bill was the bill itself; and that not being produced, I think the defendant was entitled to a nonsuit.

TAUNTON, J.—We must abide by the general rule as to the production of instruments. I do not see how the *admission* referred to could have the effect of dispensing with the necessity of producing the bill.

PATTESON, J.—I think that it was necessary to trace the bill further. All that was proved was, that the bill was paid to the bankers. There was nothing more in reality proved, or attempted to be proved, than that nothing more had been heard of the bill.

WILLIAMS, J. concurred.

Rule refused.

*Follett* then moved for a new trial, upon an affidavit stating that the bill had been in Scotland; that, in sufficient time before the trial, the plaintiffs had sent for it; that it came, but not until after the trial; and that they now had it in their possession. He submitted that the fact of the bill having been out of the jurisdiction of the Court, so that he could not *compel* the production of it, was a ground for now granting a new trial.

*Per Curiam*—

Rule nisi granted, upon payment of costs.

(a) 7 Dowl. & Ry. 523; 5 Barn. & Cressw. 134.

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In the matter of FENTIMAN.

The Court will not grant a rule nisi for a criminal information against magistrates, unless it appears they have acted from an *oppressive, dishonest, or corrupt* motive, under which *fear or favour* are included.

A magistrate is entitled in *all cases* to six days' notice of an intention to apply for a rule nisi for a criminal information, and it is not sufficient that in point of fact six days have expired between the notice and the motion, if the notice contemplates an earlier application.

**F. POLLOCK** applied for a rule, calling upon two magistrates of the East Riding of Yorkshire to shew cause why a criminal information should not be filed against them, for having acted harshly and oppressively towards *Mr. Fentiman*. The affidavit disclosed a variety of circumstances, from which it would appear that the magistrates had acted with harshness, and had unnecessarily put *Fentiman* to inconvenience. Notice was given on the 31st of October, that the Court would be moved on the first day of term, or as soon after as counsel could be heard.

Lord DENMAN, C. J.—It does not appear to me that there is sufficient proof of *corruption* to warrant the Court in granting a rule for a criminal information against these magistrates, though there may be much that is *reprehensible* and *suspicious* in their conduct.

There is, however, another objection which would prevent the granting of an information in this instance. The rule requiring six days' notice to the magistrates, before an application of this description is made, has not been complied with. The notice was given on the 31st of October, that a motion would be made on the first day of term, or as soon after as might be. Now certainly more than six days have, in point of fact, elapsed between the giving of the notice and the making of the motion. But that is not sufficient. In *Rex v. Flounders*(a) *Mr. Pollock* took the objection, that sufficient notice had not been given of the prosecutor's *intention to move* for a rule,—for that magistrates are entitled to have six days' notice to prepare themselves to shew cause. The Court decided that the magistrates were entitled to six days' notice of the *intention to move*; and the rule which had been granted was discharged. That, undoubtedly, was under an act of parlia-

(a) *Ante*, vol. i. 502; 4 Barn. & Cresw. 448.

ment(a), expressly requiring six days' notice to the magistrates in the cases to which that act refers. But where there is a provision requiring *reasonable* notice, that has been construed in practice, by analogy, to mean *six* days' notice, in order that the magistrate may have an opportunity of compromising the matter, or shewing cause against the rule in the first instance. It appears to me that the rule requiring six days' notice is equally applicable here, and that the notice must, therefore, be held insufficient. I mention it because it is extremely important that the rule should be well understood, and that a motion should never be defeated by a want of adherence to them.

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TAUNTON, J., concurred.

PATTERSON, J.—The notice is insufficient; but I would not have it supposed that the rule would be granted if the notice had been regular; for though, from the statement of Mr. Pollock, it appears to have been a very irregular transaction on the part of these gentlemen, yet I have always understood that a criminal information against magistrates cannot be granted, unless there be a *corrupt motive*. That is laid down in *The King v. Barron*(b). Whether the act, on investigation, may turn out to be right or legal, is not the question, but it is—whether it has proceeded from an oppressive, a dishonest, or a corrupt motive, under which fear or favour may be generally included.

Now if it had been brought home to these magistrates that they acted from fear or favour, the information would have been allowed to be filed, but not otherwise.

WILLIAMS, J.—I entirely agree with the rest of the Court. Though I cannot by any means approve of the acts of these gentlemen, as they appear upon the affidavit; yet I quite agree that unless there is something distinctly

(a) 13 Geo. 2, c. 18, s. 5.

(b) 3 B. & A. 434.

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bringing home *corruption* to magistrates, we ought not to interfere.

TAUNTON, J.—I think it right to add, that I perfectly agree with what has fallen from my brother *Patteson*. The rule in these cases has been, throughout the whole of my experience, as he has stated it.

Rule refused.

The KING v. The Inhabitants of BARNARD CASTLE.

A woman being yearly tenant at 50s. a year, marries. Her husband, by forty days' residence on the premises, gains a settlement *by estate*.

But when a man, being yearly tenant, dies, and his wife occupies and pays rent as one of the next of kin, but without taking out letters of administration, the wife neither gains a settlement herself, nor is a settlement gained by a second husband, by reason of his marriage with her during such occupation and of forty days' residence.

UPON an appeal against an order of two justices of the county of Durham, for the removal of *Henry Siddle*, his wife and children, from the township of Barnard Castle, in the county of Durham, to the township of New Forest, in the North Riding of Yorkshire, the order was quashed, subject to the opinion of this Court on the following case:

The appellants contended that the pauper, who had been settled by parentage in New Forest, had subsequently gained a settlement in Marrick, by virtue of his *residence on the property of his wife* in that township, under the following circumstances:

The pauper, in 1827, married his present wife, then a widow of the name of *Isabella Clementson*, whose former husband rented a cottage in Hirst, in the township of Marrick, in the North Riding, at *fifty shillings* a year, payable on 21st June and 21st December, and was residing in it at the time of his death, in September, 1826.

The widow did *not take out administration*, but *continued to live in the house with her five children from her husband's*

Whether the widow of a yearly tenant, who, without taking out administration, continues the occupation and pays rent, is to be considered as holding in her own right, or as next of kin with an incomplete representative character, is a question of fact to be found by the sessions as a fact.

But the Court will not send back a case of this nature to be re-stated, except in case of urgent necessity. *Semle*.

death till her marriage with the pauper, in September, 1827, and paid the rent due in December, 1826, and June, 1827.


On his marriage, the pauper went to reside on the premises, and paid the half-year's rent due on the 21st December, 1827. He continued to occupy and pay rent for the tenement for several years,—first the old rent of 50s., and afterwards 4l.

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Ingham and Follett, in support of the order of sessions. It cannot be disputed but that if the wife was, at the time of her second marriage, *tenant in her own right*, her husband acquired a settlement by residence for forty days upon the premises; but it will be said that this is the case of a party who, having *an incomplete representative character*, continues the tenancy of the intestate. It is quite clear that the widow *was* tenant in her own right. She stands in precisely the same situation as if she had been a perfect stranger, not entitled to take out administration, and as such had entered upon the death of the intestate, and had paid rent which the landlord accepted. Such payment and acceptance of rent are sufficient to constitute the relation of landlord and tenant. However *short* may be the term, and however small the *value* of the estate, the existence of that relation, together with forty days' subsequent residence, is sufficient to confer a settlement upon a party to whom the estate comes by operation of law.

Cresswell and Grainger, *contrà*. Undoubtedly, if the wife was *tenant* at the time of her second marriage, a settlement was acquired by her husband; but she did *not* possess that character. Nothing had been done to determine the interest of the personal representative of the first husband. It must be inferred from the facts stated, that the first husband was tenant from year to year, and that his tenancy could not have been determined until 21st Dec. 1827. In *Doe v. Porter (a)*, it was decided that an admi-

(a) 3 T. R. 13.

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nistrator is entitled to whatever chattel interest the intestate was possessed of, and that where an intestate was tenant from year to year, the administrator is entitled to continue the tenancy, until determined by six months' notice as in ordinary cases, and may maintain ejectment. Any person taking out letters of administration, might have brought ejectment against either the landlord or the widow. The landlord could not let to the widow whilst the old tenancy subsisted; and at the time of the supposed creation of a new tenancy, the old tenancy still of a necessity subsisted, for there was no legal representative who could possibly surrender it. It was said by Mr. Justice *Littleale*, in *Rex v. Great Glenn* (a), "that it was perfectly true that the wife could not surrender her husband's estate, (he being dead intestate,) before taking out letters of administration." If administration had been taken out by some third party, and the landlord had given him six months' notice to quit, the landlord, upon the expiration of the six months, might have ejected the widow *without notice* notwithstanding his acceptance of rent from her; *Doe v. Bradbury* (b). He might say that he accepted the rent from her as executrix de son tort. It appears that the widow paid the rent due in December, 1826. This must have been paid partly as the representative of her husband, who died in the middle of the half-year for which the rent was so due. This case cannot be distinguished from *Rex v. Widworthy* (c). In that case the pauper had resided with his father in a cottage of small value, which the father held for a term of years. The father died intestate, leaving the pauper and another son. The pauper continued to reside in the cottage until the expiration of the term—no letters of administration being taken out until after that time. It was held that his residence was to be referred to his imperfect representative character, and that therefore he gained no settlement. If it be said that the payment of rent by the

(a) *Ante*, vol. ii. 96; 5 Barn. & Adol. 188.

(b) 2 Dowl. & Ryl. 706.

(c) Burr. S. C. 109.

widow in December, 1826, is to be considered as a payment for *her own* occupation as tenant, it may with equal force be urged that the second husband, by payment of rent after his marriage, made the tenancy in respect of which the rent was paid *his own*, and that therefore he did not reside for forty days on an estate to which he had come in by operation of law; and consequently, that the cottage being of less yearly value than 10*l.*, he gained no settlement.

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Lord DENMAN, C. J.—The settlement which has been found by the sessions in this case, is a settlement by residence for forty days on the estate of the wife. The question is, whether the statement proves that the pauper *did* reside on such an estate. It appears to me that it is sufficiently proved. I apprehend that no doubt could reasonably be entertained on the subject, if the facts occurring subsequently to the death of the first husband were to be taken alone; but the question is, whether the statement of her former husband's having been yearly tenant to the same landlord, at the same rent, payable at the same times, raises such a presumption of her coming in in her representative character, which she never completed, as that we are to say she was holding by wrong, and not holding by right. It appears to me that it ought to be stated as a fact, that she was continuing her husband's tenancy, and that we cannot assume that she was acting unlawfully or in the assumption of a right she did not possess. That fact is not found upon the case. On the contrary, the statement as to the holding and payment of the rent, is quite sufficient to make out satisfactorily to my mind, that she was holding as a yearly tenant in *her own right*, after the death of her former husband, with whose right she did not clothe herself. Now it may certainly be said there is a doubt in the statement of this case, whether she held in one right or in the other; and it would perhaps have been more *satisfactory* if the sessions had stated the one or the other, which they have

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not done; and in that view of the case it would perhaps be proper to send it back to be restated; but considering the nature of the case, and taking all the circumstances together, it appears to me highly probable that the sessions have stated every thing that it was *possible* for them to state. I do not think any other facts are *likely* to have been brought before them; but if there had been any, the facts, as they are stated, might be a sufficient answer to them. I think we may safely act upon the case as it comes before us, and conclude that the sessions have done right in deciding in favour of the settlement.

TAUNTON, J.—I am very sorry that in such an insignificant case as this there should be any difference of opinion upon the bench. Such difference, however, existing, I do not pronounce the opinion at which I had arrived, (and which to my mind at present is so satisfactory, that I do not wish for further time for consideration,) without considerable mistrust. At present, however, I cannot fashion to myself any sort of doubt upon the question, and I beg it may be understood that I decide the present case and the present question, simply and strictly upon the circumstances stated in the case. Now let us see what the case is. This woman's first husband died in September, 1826. She continued in the occupation of the premises. She did not take out any administration—she was therefore *a mere stranger*, having no representative character. She is stated to have paid the *rent* due in December, 1826, and June, 1827, i. e. the first two half-years' payments that occurred after the death of her husband; and the question is, whether it must *necessarily* be inferred that these payments were made by her *on her own account*, so as to constitute *herself* the tenant to the landlord; or whether they must be referred to that prolongation or continuance of the interest which she *might* have taken to herself as the personal representative of her husband, so as to be considered as a payment *not* on her own account. Now I think that the sessions having

found in favour of the settlement, they have in effect found that these payments were by the widow on her own account; and really, with all respect to those who maintain an opposite argument, I think it would have been a very strained and forced supposition to imagine that she, *without any legal obligation* whatever to pay this rent, could have intended to pay it as the *representative* of her husband, and not in her *own right*.

I agree that the tenancy might, in point of law, be considered as capable of continuing, no notice to quit ever having been given; and that the landlord might, if he had pleased, have considered that the tenancy of the husband was existing, and might have acted accordingly; but the truth is, that he never did interfere. The widow paid the rent—the landlord accepted it. In what light did he accept it? Did he accept it as due from herself, during the time that had elapsed since the husband's death, or must he be supposed necessarily to have taken it in consideration of that prolonged interest which she *would* have had if she had obtained the right of administration? I think the more probable inference is, that he accepted the rent—and never thought of the interest which she would have had, if she had been the personal representative,—that he accepted it *for her occupation*, and accepted it from her *in her own right*. Then if that be so, there is an end of the question. I really believe I have stated the whole question. If the rent was paid by her, and the landlord accepted it as due from her *personally*, she thereby became the tenant from year to year in her own right, and therefore upon her marriage with the present pauper, in September, 1827, he coming in by operation of law, and subsequently residing forty days on the premises, acquired a settlement, although the value was only fifty shillings a year. I think, therefore, under all the circumstances, that there is sufficient, (to satisfy me at least,) that she paid the rent *in her own right*. I certainly think that the sessions might have stated this case with more distinctness,

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but I think that the inference which the sessions appear to have drawn, and which I adopt, is so plain and clear, that it need not be sent back to the sessions for re-statement. If there had been any thing which struck my mind as a *serious* doubt, I certainly should have thought it much better to send the case back to the sessions, to state in what character the rent was paid by the widow; but I do not think there is doubt enough to justify the Court in doing that, for it is always to be considered in these cases, that when a case is sent back to the sessions, very considerable expense is occasioned. The sessions cannot amend its record without rehearing the case, which in effect comes on again by way of new trial, and it comes here again for the ultimate opinion of the Court. That course (although it is necessary in *some* cases for the purposes of justice) ought not to be adopted, except in cases of pressing necessity.

PATTESON, J.—There is no difference of opinion in the Court as to the *law* in this case. It is perfectly clear that if the widow became tenant in her own right, and was occupying in her own right, although *she* would have gained no settlement herself, the property being under 10*l.* yearly value, yet when she married again, the *husband* residing on that property would obtain a settlement. And there is not the slightest doubt but that if the widow occupied as next of kin, without taking out letters of administration and so clothing herself with the representative character, she gained no settlement herself, nor did the second husband, by marriage and residence for forty days, become settled.

There is no doubt therefore as to the *law* of the case; the doubt is as to the *matter of fact*, and I must, with respect for the rest of the Court, confess that I should have been better satisfied to have sent the case back again to the sessions. The sessions are *supposed* to have drawn (I very much doubt whether they really have drawn) an inference of fact from certain facts which are stated in this case. That inference of fact is, that the widow, after the death of

her husband, became the tenant in her own right. Now they have not drawn it *in words*; and the consequence of leaving it to this Court to draw the inference from the facts which they have stated, is, that some of the Court have been led to draw an inference of fact one way, and some the other way. I think the sessions ought to have stated the inference, and that it would be proper to send the case back. Nevertheless, as it is not a matter of the slightest importance, and as my lord and my learned brother *Taunton* think it is quite clear that the sessions *did* mean to draw that inference of fact, the case ought not to be sent back. For my part I think that some evidence of the creation of a *new tenancy*,—of some *new contract* between the landlord and the widow, was necessary to entitle the sessions to draw that inference of fact; for I think it is too much to say that the mere fact of the payment of rent by a widow, who continues to reside with her children in the house, after the husband's death, she being one of next of kin, amounts to the creation of a *new tenancy*;—more especially here, as part of the rent she first pays is rent in respect of occupation by her husband. It seems to me that the payment is more properly referable to the situation in which she stood of *next of kin*, entitled to take out letters of administration, but having neglected to do so. Suppose it had happened that she having paid the rent again in the month of June, had in the next half-year taken out letters of administration, (as she was entitled to do,) and had resided on the premises; she would then have had a right to say, "I am resident on these premises *as next of kin*, having taken out letters of administration, and having the estate thrown upon me by act of law"—and would she not have gained a settlement? Could it have been answered "no, you have paid the landlord a *new* rent, and you are his *new* tenant." I think not, if there was nothing to shew that but the mere circumstance of her having paid rent. There was no interference found on the part of the *landlord*, and for *that* reason I think the infe-

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rence ought to be the other way. There ought to be an interference by the landlord—there should be *some evidence* to shew that the landlord and the woman had come to a new agreement, and in the absence of that, I think, it is referable to her situation of next of kin. That being so, it would be more satisfactory to *my* mind to send the case back to the sessions. It may be that the sessions, by finding that the *settlement* was acquired, did mean to find as a fact, that the woman was tenant *in her own right*, unless, (as it struck me in the course of the argument, and when I first read the case,) the point intended to be raised here was, whether the widow, being next of kin and residing on the premises, acquired a settlement by such residence *as next of kin*. If, however, the sessions have really drawn the inference that there was a change of tenancy, there is no doubt about the law, that a settlement *was* acquired.

WILLIAMS, J.—I am very sorry that on a point like the present there should be any difference of opinion. There is none upon the *law*. The only question is, whether upon these facts this woman was *tenant* of the premises. It is properly conceded, that if she was *tenant*, the legal consequence follows that the husband gained a settlement. It does not appear satisfactorily to my mind, that there is evidence, or that the sessions *meant* to find that there was payment of rent by this woman, and acceptance of rent from her *on her own account* by the landlord, so as to constitute her tenant of the premises; because it appears to me very strongly, that if the sessions did intend to find the fact that she was *tenant* at the time of the marriage, it would have been stated as a simple fact. In the case of *Rex v. North Curry* (a), the fact was simply stated that the woman was *tenant*: therefore the legal consequence (about which there is no difference of opinion to-day) followed. That statement being omitted here, it does not satisfactorily ap-

(a) 4 Barn. & Cressw. 953; 7 Dowl. & Ryl. 424.

pear that she was *tenant*; and I should have been better satisfied if that had been found affirmatively by the sessions.

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Order of Sessions confirmed (a).

(a) The Court being equally divided, the *rule* to quash the order of sessions would fall, and that order would stand; and the effect would be the same as if there had been a *positive* confirmation.

The KING v. The Inhabitants of the Ville of ST. GREGORY.
in the City of Canterbury.

UPON an appeal against an order for the removal of *George Dalton*, his wife and child, from the ville of St. Gregory, in Canterbury, to the parish of Gillingham, in Kent, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

By a local act of 1 *Geo.* 1 (b), intituled “An Act for erecting a Workhouse in the city of Canterbury, for employing and maintaining the Poor there, and for better enlightening the streets of the said city,” it was enacted that there should be a perpetual corporation within the city of Canterbury,—to consist of the mayor, recorder, and justices of the peace of the said city and county of the same for the time being, and also twenty-eight other persons, to be chosen as therein mentioned from amongst the inhabitants, —and to be called “Guardians of the Poor of the city of Canterbury.” It was also enacted by the same statute, that it should be lawful for any court of assembly consisting of twelve guardians at the least (of whom the president or his deputy to be one), among other things, to keep in the service of the corporation, or to set to work until the age

Where a statute incorporating guardians of the poor of a certain district, enacted that it should be lawful for the corporation to bind out apprentices for any number of years, “provided such child be not bound for a longer term than until he or she shall have attained the age of twenty-two, if a boy, and twenty if a girl.” it was held that an indenture by which a boy, fifteen and a half, was bound for seven years, was *voidable*

(b) 1 *Geo.* 1, stat. 2, c. 30.

only and not *void*; and that, therefore, a settlement might be gained under it. Public policy was said to be an unsafe and unsatisfactory, though a legal, ground of decision.

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of fifteen, any poor child of the said city or parishes who should be chargeable to any of those parishes, and after such child should have attained the age of fifteen, or sooner, the corporation were empowered, by indenture under their common seal, to bind such child apprentice to any honest person within the kingdom of England, for any number of years the corporation should think fit. "Provided such child be not bound for a longer term than until he or she shall have attained the respective ages following, a boy the age of two-and-twenty, and a girl the age of twenty."

11th January, 1812, *George Dalton*, the pauper, was born.

5th October, 1827, *George Dalton* being a poor boy, chargeable to one of the parishes mentioned in the act, was by the guardians bound by indenture to *Edward Barber* of the parish of Gillingham, cordwainer, for seven years.

The sessions held, that the pauper having been bound for a longer term than until he should have attained the age of twenty-two, the indenture was void by the statute, and that service and residence under it conferred no settlement.

Walsh and *Espinasse* in support of the order of sessions. The indenture is void. The guardians of the poor of Canterbury have no power to bind out apprentices except under the statute. By that statute a power is given to them; and in executing it they must confine themselves strictly within the terms of the enactment conferring that power. The proviso that a boy shall not be bound for any longer term than until he shall have attained the age of twenty-two years, is a restriction upon the power, which therefore is not well executed where the proviso is disregarded. In *Rex v. Hamstall Ridware*(a), it was held, that an indenture of apprenticeship which had been assented to, and signed by two justices at different times, and not in the presence of each other, was void, under 43 Eliz. c. 2, s. 5, which gives authority to parish officers, by the assent of two

(a) 3 T. R. 380.


justices, to bind out poor children apprentices. In *Rex v. Hipswell* (a), it was held that an indenture by which a boy under eight years of age was bound apprentice to a chimney-sweeper, was absolutely void under 28 Geo. 3, c. 48. That case, it will be said, was decided on the ground that it was provided by the act that all indentures for binding any boy under eight years of age as an apprentice to a chimney-sweeper, should be void to all intents and purposes; but the decision appears rather to have proceeded on the ground that such binding was *prohibited*. In *Rex v. Gravesend* (b) it was decided that an indenture by which a pauper bound himself to serve the widow of a freeman of the Watermens' Company, she not being the occupier of a house or tenement wherein to lodge herself and such apprentice, was absolutely void, and that therefore, by service under it, the apprentice gained no settlement. In the act upon which that decision proceeded (10 Geo. 2, c. 81,) there was no provision making such indentures void; but it merely said that it *should not be lawful* for any waterman, though a freeman of the Watermens' Company, or his widow, to keep any person as his or her apprentice, unless he or she were the occupier of some house or tenement wherein to lodge himself or herself, and such apprentice; and that he or she should keep such apprentice in the same house or tenement wherein he or she should lodge or lie, on pain of forfeiting 10*l.* for every offence. Lord Ten-terden, C. J., in giving judgment in that case, says, "The contract was a *prohibited* contract, and the case falls within the principle of the decision of this Court in *Rex v. The Inhabitants of Hipswell*. Upon the authority of that case, and upon the distinction between a prohibited contract, and a provision like that of the 26th section of the statute of Elizabeth, (5 Eliz. c. 4, which provision his lordship had previously designated as *permissive only*,) we are of opinion that this indenture of apprenticeship is absolutely void, and

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(a) 2 Man. & Ry. 474; 8 Barn. & Cresw. 466.

(b) 3 Barn. & Adol. 240.

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that no settlement could be gained under it." The distinction which is there taken by Lord *Tenterden* is applicable here. The restriction upon the power given to the guardians of the poor of Canterbury amounts to a *prohibition*. The cases of *Rex v. St Petrox*(a), and *Rex v. Wolstanton*(b), may be cited *contrà*, as showing that such a defect in the indenture as existed in the present case, made it *voidable* only, and not *void*. The first of these cases is upon the 5th *Eliz.* c. 4, the provisions of which are distinguishable from those of the Canterbury Act; and with regard to the latter case, the opinion there expressed with respect to the duration of the time for which an apprentice may be bound is *extra-judicial*, and seems to have gone further than the law warrants, as appears by the decision of Lord *Kenyon* in *Rex v. Hamstall Ridware*.

Thesiger and *Deedes*, *contrà*. *Rex v. Hamstall Ridware*(c), *Rex v. Hipswell*(d), and *Rex v. Gravesend*(e), are no authority whatever to shew that the indenture is void. *Rex v. Hamstall Ridware* is distinguishable, because the assent of the two justices to the binding out of the apprentice was necessary to the completion of the indenture, and therefore formed a sort of condition precedent. In the two other cases the decisions proceeded upon prohibitory statutes, which recited certain public mischiefs; and for the remedying of them enacted, in the one statute, that indentures such as that in *Rex v. Hipswell* should be void to all intents and purposes; and in the other, that the taking of apprentices by persons situated as the mistress in *Rex v. Gravesend* was, should *not be lawful*, and should make the master or mistress liable to a *penalty*. The distinction taken by *Bayley*, J., in *Rex v. Hipswell*, between a provision introduced *for the benefit of the parties* only, and one introduced *for public purposes*, applies here. The proviso

(a) Burr. S. C. 248.


(b) Bott's P. L. 876.

(c) *Suprà*, 138.

(d) *Suprà*, 139.

(e) *Suprà*, 139.

limiting the ages to which apprentices may be bound by the guardians of the poor of Canterbury, is evidently introduced *for the benefit of the apprentices*; as, but for the proviso, the guardians would have had power to bind for an unlimited time. The defect can only, therefore, be taken advantage of by *the apprentice*. It, in effect, merely provides, for the benefit of the apprentice, that the binding shall not continue in force after the apprentice shall have attained the specified age. *Rex v. St. Nicholas, Ipswich*, (a) *Rex v. Evered* (b), *Gray v. Cookson* (c), *Rex v. St. Petrox* (d), and *Rex v. Woolstanton* (e), are all strong authorities to shew that the indenture, in this case, was not void, but at the furthest voidable.

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Lord DENMAN, C. J.—It appears to me to be quite clear that *Rex v. Hipswell* and *Rex v. Gravesend* do not apply to this case; because the former case depended upon a statute by which the indenture is expressly avoided if made in any form not prescribed by the statute; and the latter case turned upon an act by which an undertaking such as was there entered into by the mistress, viz. to keep the pauper as an apprentice, she not having a house wherein to lodge herself and the apprentice,—was made an *unlawful* and criminal contract. Those contracts were properly held void to all intents and purposes. But those cases have not overruled some of the former decisions, as *Rex v. St. Nicholas, Ipswich*, in which words much stronger than any in this case were held only to give the *party* a right to avoid the indenture if he should think proper. It appears to me that when it is said that it shall be lawful for the corporation to bind out, *provided* they do not bind beyond the age of twenty-two, the words of the proviso are words merely directory, and directory words as mild as it was possible for the legislature to employ. I think, there-

(a) Burr. S. C. 91; 2 Stra.
 1066.

(b) Caldecott, 26.

(c) 16 East, 13.

(d) *Suprà*, 140.

(e) *Suprà*, 140.

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fore, that there is nothing to warrant us (unless we were prepared decidedly to overrule the cases to which I have referred, and to enter into a very strict consideration of the effect of such provisions,) in deciding that the indenture in this case is not a binding indenture, so that the apprentice could by service under it gain a settlement.

I abstain from deciding this case on any views of public policy.

TAUNTON, J.—I am of the same opinion. It certainly is a matter of very great regret that the Courts, in many instances, either to further the apparent justice of the case, or the convenience or interest of the parties, have put such constructions on statutes of this sort, that it is utterly impossible, in my judgment, to reconcile them all. This has given rise to a great number of questions upon provisions of this sort, and has much embarrassed the Courts. The power given to the guardians of the poor of Canterbury consists of an authority or privilege; it is *permissive* in its nature, and not *prohibitory*, and therefore it seems to me to range itself within the distinction taken by Lord Tenterden and the Court in *Rex v. Gravesend*. There are other cases in which the language has been much stronger, viz. where the statute has provided that if the thing to be done be done otherwise than in the form prescribed, it shall be *null and void*; and yet the Court has decided that the thing, though done otherwise than in form prescribed, was *voidable* only. If in this case we hold that the proviso has the effect of making the indenture voidable only, no injustice will be done, because the apprentice, if bound beyond the age of 22, and contrary to the proviso of the statute, will have all the time that elapses from his attaining the age of 22 (when he will have arrived at years of discretion in the judgment of the law) and the expiration of the term of his apprenticeship, to put an end to the contract, and emancipate himself from his obligation provided he does not like it.

Some cases (for instance, *Rex v. Hipswell* and *Rex v. Gravesend*) were decided partly, as appears from the reports, on grounds of *public policy*. Undoubtedly that is a very questionable and a very unsatisfactory ground of judgment, because men's minds will be disposed generally to differ very much on the nature and extent of public policy; but still that is the ground on which some of the decisions have been put, and therefore it must be considered a legal ground of decision. It is sufficient for me to observe that there does not appear to be any invasion or any encroachment on public policy, in adopting the decision which the Court in this instance have come to, viz. that the indenture, notwithstanding this objection, conferred a settlement.

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PATTERSON, J.—It appears to me that *Rex v. Hipswell* and *Rex v. Gravesend* do not apply to the present case; for in *Rex v. Hipswell*, the legislature had enacted that if certain things were not done, the indenture should be absolutely null and void; and in *Rex v. Gravesend*, the legislature had enacted that any binding contrary to the provisions of that act should be absolutely illegal,—which is the same thing. In this case there are no such words in the enacting part; neither is this a case in which public policy is in any way concerned. *Rex v. Hipswell* and *Rex v. Gravesend* were also strongly put by the Court, upon the ground of public policy; therefore also they do not apply; and if they do not, then the earlier cases are all directly in point, and I think we must hold it to be an indenture that is voidable only, not void.

WILLIAMS, J.—I am entirely of the same opinion. I have watched with great anxiety to see whether the learned counsel who object to this indenture as being incapable of conferring a settlement, were able to bring before the Court any case in the books in which a proviso similar to this, or at all approaching to it, was held to be of such a

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prohibitory nature as to render the indenture void for all purposes, including that of a settlement. None such has been produced; but, on the contrary, cases have been brought before our notice in which, notwithstanding strong prohibitory words, a settlement has been held to be gained.

I quite agree with the rest of the Court, that the ground of public policy is a very unsafe ground of decision; it is infinitely better to decide in each case upon the *words* of the act.

Order of Sessions quashed.

SARAH TILL-ADAM, Executrix of JOHN TILL-ADAM, v.
 The Inhabitants of the City of BRISTOL and County of
 the same City.

If an action
 be brought by
 a termor upon
 7 & 8 Geo. 4,
 c. 31, for an
 injury done to
 his house,
 within three
 calendar
 months from
 the offence
 committed,
 and that ac-
 tion abates by
 the death of
 the termor,
 after the three
 months have
 expired, his
 executor can-
 not bring a
 fresh action.

Whether an
 executor of a
 termor can in
 any case bring
 an action upon
 7 & 8 Geo. 4,
 c. 31, for an
 injury sustained in the lifetime of his testator, *quære*.

IN this action, after issue joined, the parties, by consent, and by order of *Taunton, J.*, stated the following case for the opinion of the Court:

1818. The Corporation of Bristol, being seised in fee of a house and warehouse in Bristol, demised it by Indenture to one *Player*, for forty years, subject to a covenant to keep the premises in repair and to rebuild in case of destruction by fire.

1822. *Player* assigned to the testator.

1829. The testator, being in possession under this assignment, granted, by indenture, an underlease to one *Webb*, for seven years, subject to a yearly rent of 85*l.*, and subject to a proviso that if the premises should be destroyed by fire, tempest, or other accident, the rent should cease.

31st October, 1831. The house and warehouse were feloniously destroyed by a riotous and tumultuous assembly of people, who set fire to and burnt the same.

The testator, being a person damnified, within due time complied with all the requisites of 7 & 8 *Geo.* 4, c. 31, to entitle himself to maintain his action and recover full compensation, for the damage so done to him, from the inhabitants of the city of Bristol and county of the same city, within which the said offence was committed.

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20th January, 1832. The testator, to recover compensation for this injury, commenced an action upon the case, by original writ, against the defendants; to which they duly appeared.

17th May, 1832. Before verdict or judgment, the action abated by the death of the testator.

24th May, 1832. The plaintiff, having proved the will of the testator, in which she was named executrix, sued out an original writ against the defendants, which alleged the suing out of the former writ by the testator, and the several facts above stated in this case, and demanded compensation from the defendants for the damnification and injury therein alleged to have been sustained by the testator, and by the plaintiff as executrix since his death, by means of the said offence.

The question for the opinion of the Court is, whether the plaintiff is entitled to maintain this action and to recover therein compensation for the damage done. If the Court shall be of opinion in the affirmative, then judgment is to be entered for the plaintiff for such sum as the parties have agreed upon; otherwise, the judgment is to be entered for the defendants.

Coleridge, Serjt., for the plaintiff. The first question which arises is, whether the *executor* of a termor can maintain an action on 7 & 8 *Geo.* 4, c. 31; and the second question is, whether, if an action be duly commenced by a termor, and abate by his death *more than three calendar months* after the offence committed, his executor can bring *another* action.

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First point:
Whether action maintain-
able by personal repre-
sentative for injury done in
lifetime of
termor.

I. This action is founded on the statute of 7 & 8 Geo. 4, c. 31, which is substituted for several previous acts which gave a party a remedy against the hundred, for damage occasioned by persons riotously and tumultuously assembled. The previous acts have invariably received a *liberal* construction, on the ground that as the statutes had taken away the *civil* remedy against the rioters, by making the offence a *felony*, and in lieu of it given a remedy against the hundred, the substituted remedy should be held to be as ample as the original right of action. *Ratcliffe v. Eden* (a), *Hyde v. Cogan* (b), and *Wilmot v. Horton* (c). In the last case *Buller, J.*, said, that these acts were *remedial*, and for that reason ought to receive a *liberal* construction. If the former acts ought to be construed liberally, *à fortiori* ought a liberal construction to be put upon the *present* act, because it was intended that it should operate to *extend* the remedy. The general intention of the act, both as regards actions and summary proceedings, is to do that which *justice* and *equity* require. By section 2, if any house, &c. is destroyed, the inhabitants of the hundred are rendered liable to yield full compensation to the person or persons *damnified* by the offence. "Damnified" means—damnified in respect of the property mentioned in the former part of the clause. Is then an executor a *person damnified*? This is a *chattel* interest, which has devolved upon the executor, and the damage is done to the property which has so devolved upon him. An executor may maintain an action for an injury done to a chattel interest before the death of his testator. The rule, that *actio personalis moritur cum personâ* (d), has been relaxed in many instances. It was first broken in upon by the statute 4 Edw. 3, c. 7, *de bonis asportatis in vitâ testatoris*. The cases upon that statute are collected in a note to *Wheatley v. Lane* (e); and it is there said that this statute has always been expounded

(a) Cowp. 485.

(b) 2 Dougl. 702.

(c) *Ibid*, in the notes.(d) As to this rule, *vide ante*, vol. i. 418, n.

(e) 1 Wms. Saund. 216 a.

largely. In *Holt v. Bradford* (a) it was determined that an action of debt may be brought by the *executor* of a parson, for not setting out tithes pursuant to the statute of *Edw. 6* (b). In *Palgrave v. Windham* (c) it was held that Case was maintainable by an administrator, against the bailiff, for removing goods taken under a *fieri facias*, before the landlord had been paid his year's rent, pursuant to 8 Ann. c. 17. These actions were maintainable, because the estate of the testator and intestate was damaged. Upon the authority therefore of these cases, and as the executor in this case would have been entitled to the action if this statute had not passed, he ought to be permitted to maintain this action. This suit was commenced before the passing of the 3 & 4 Will. 4, c. 42; but no inference in favour of the defendants can be drawn from the provision, in the second section of that statute, enabling executors to bring actions for injuries done to the real estates of the deceased, where there was no remedy provided by law. In the present case it is contended that the executor had already a remedy by law.

II. The only question remaining is,—whether the action, having been properly commenced by the testator, and having abated by his death more than three calendar months after the offence committed, his executor is or is not barred by the *limitation clause* from bringing another action. The third section provides that no action shall be maintainable unless the person or persons damaged, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the offence, go before a justice of peace, and do certain other acts (d); and that no person shall bring any such action unless he commence the same *within three calendar months after the commission of the offence*. The requisites of this section have been once complied with. The right of

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Second point:
Whether a second action lies for the executor after the three months are expired.

(a) 1 Sid. 88.

(b) 2 & 3 Edw. 6, c. 13.

(c) 1 Str. 212; S. C. 9 Vin. Abr. 157, *tit.* Distress (O. S.), pl. unic.

(d) *Vide ante*, vol. i. 719.

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action is not given by the *third* section, but by the *second*. The third section is in *restraint* of the action given by the second. When therefore it is shewn that the third section has been once complied with, the act must be read as if the second section stood alone. In *Kinsey v. Heyward* (a) the plaintiff declared in *indebitatus assumpsit*, as administratrix, against the defendant, as executor to *Heyward*. The defendant pleaded the statute of limitations. The plaintiff replied that the intestate sued a *clausum fregit*, returnable in K. B., in which he intended to declare in *assumpsit* for this debt against *Heyward*; that *Heyward* died; that the intestate sued another writ against the defendant; that then the intestate died, and she, being administratrix, sued this writ, &c. The Court held, that as an action had been brought within six years, the statute of limitations was satisfied, and that an action, in analogy to the old mode of proceeding by journeys-accompts (b), might be brought within a reasonable time. [*Taunton, J.* It will probably be objected, on the other side, that the language of the two statutes is different.] In the statute of limitations, no period of time is given to an *executor* to bring his action, but there is a general limitation of six years only; yet it is settled that an executor may bring an action within a year after. Cases to this effect are collected in *Williams on Executors* (c). In *Wilcocks v. Huggins* (d) it is laid down that an executor may bring a fresh action upon the *equity* of the statute of limitations. In *Lord Middleton v. Forbes* (e) an action was brought, by an administratrix, within six years after the cause of action accrued; the administratrix married, and, after the lapse of six years from the time when the cause of action had accrued, she and her husband

(a) 1 Lord Raym. 432; 1 Lutw. 257.

(b) *Days computed*, or rather *computation of days-journeys*,—the language of the counterplea, after connecting the proceedings with a former writ which had been

abated, being, *quod petens (vel querens) per dietas computatas recenter tulit aliud breve.*

(c) Vol. ii. 1156.

(d) 2 Stra. 907; *post*, 156, 157, n.

(e) Willes, 259 (c).

brought another action; the statute of limitations was pleaded, and was held to be no bar.

If this action is not maintainable, there will be a defect of justice; and the maxim, that the act of God causes injury to no one, will be contravened. In *Com. Dig. (a)* it is said, "For necessity, that there be not a failure of justice, a statute shall be expounded contrary to the words;" and many instances of such expositions of statutes are given. There are also numerous instances mentioned in 2 *Inst.*, in which the Courts have dealt with statutes in a similar manner. It may be urged that such an enlarged construction is given only to *ancient* statutes, on account of their great conciseness; but in *Ethersey v. Jackson (b)*, which was recognized in *Johns v. Johns (c)*, a similar construction was put upon the modern statute of 8 & 9 *Will. 3*, c. 11.

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Joseph Addison, for the defendants. With respect to the first question;—if this species of injury had not been made a felony by statute, the injured party must have brought an action of *quare clausum fregit*. The question therefore is, whether the statute of *Edw. 3* has enabled an executor to bring *quare clausum fregit*, for an injury done to a chattel real in the time of the testator. The actions of *quare impedit*, *ejectment*, and *ravishment of ward*, may be cited as instances in which an executor is allowed to recover for injuries done to real property. But in those three cases there is a continuing wrong in the time of the executor, and the plaintiff seeks to recover something beyond damages. They are not in fact personal actions. The first is a mixed action, the second a real action (*d*), and the third in the nature of a real action. They do not fall within the maxim *actio personalis moritur cum personâ (e)*.

The act of 3 & 4 *Will. 4*, c. 42, s. 2, recites that there is no remedy provided by law for injuries to the *real estate* of


(a) Title "Parliament," (R.18.)

(b) 8 T. R. 955.

(c) 3 Dow, 14.

(d) Or rather *in lieu* of a real action.

(e) *Vide ante*, i. 418, n.

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any person deceased, committed in his lifetime. This materially strengthens the argument that the executor cannot maintain this action. The enacting part of the second section of that statute does not apply here, because the injury was committed more than six months before the death of the testator. No case is to be found where it has been held that an executor can maintain *quare clausum fregit* for a trespass committed in the time of the testator; but, on the contrary, in *Emerson v. Emerson* (a), the Court were unanimously of opinion that notwithstanding the statute of 4 *Edw.* 3, no action could be maintained by an executor, against the defendant, for cutting growing corn or grass in the lifetime of the testator. That opinion was expressed *generally*, without reference to any distinction in respect of the land, whether it was held for a *term* or in *fee*. (b) It is therefore submitted that the cause of the present action is not such as would survive to the executor at common law, or by the aid of the statute 4 *Edw.* 3, which has never been extended beyond injuries to *personal* chattels or *personal* estate of that nature.

Second point.

The defendants, however, rely more on the second point. There is this distinction between the statute of limitations (c) and the present enactment,—that by the former a *restraint* is imposed on the remedy at common law, whereas, by the latter, a *new right of action*, which did not exist at common law, is given. Where an action is founded on a statute which limits the time within which the action may be brought, the plaintiff must, under the general issue, prove his cause of action to have arisen within the time limited by the statute for bringing the action;—the defendant need not plead the limitation, even in cases where the limitation is imposed by a subsequent statute. For example: in an action upon any penal statute, (which by the statute of *Elizabeth* (d) must be brought within a year,) upon a plea of the general issue, the plaintiff is bound to prove his cause

(a) 1 Ventris, 187.

(b) *Sed vide post*, 153 (e)

(c) 21 *Jac.* 1, c. 16.

(d) 31 *Eliz.* c. 5, s. 5.

of action to have arisen within a year of the commencement of the action; and there is usually an averment to that effect in the declaration. Various reasons have been assigned for this distinction; one in a note to *Hodsdon v. Harridge* (a). But, with deference to so learned an authority as the writer of that note, perhaps the true ground of the distinction will be found in the rule,—that in actions founded on a statute the plaintiff must aver every matter which is requisite to entitle him to bring the action (b).

Then with respect to the argument derived from the cases which have been cited on the statute of limitations;—assuming those cases to be law, and that an executor may bring an action after the expiration of the times limited by the statute, if brought within a year after the death of his testator, where the first action has abated;—the authority for such actions has always been understood to rest on the equity of the fourth section of that statute, by which, “If in any action judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions be or shall be brought by original, and the defendant therein be outlawed; that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action from time to time *within a year*.” There is therefore no analogy whatever between those cases and the present.

But if these cases on the statute of limitations be examined, they will be found of doubtful authority for the point for which they are usually cited.


In *Kinsey v. Heyward* (the case most relied on), the Court were not unanimous; and the judgment of *Treby, J.* (the only judgment which is given) was upon a ground not tenable, viz. that the *statute is satisfied* by an action com-

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(a) 2 Wms. Saund. 63 a.

(b) See 1 Com. Dig. title “Action upon Statute,” (A. 3.)

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menced within the six years, and the plaintiff is thereby set *at large* out of the restraint of the statute. If the limitation were avoided by an action once commenced within the six years, the 4th section would have been unnecessary. And in *Kinsey v. Heyward*, the judgment was ultimately *for the defendant*,—upon another point, it is true. So also in *Wilcocks v. Huggins (a)* and *Matthews v. Phillips (b)*, the judgment was for the defendant. And *Gargrave v. Every (c)* is *against* such an action being maintainable. [*Patteson, J. Lethbridge v. Chapman (d)* is to the contrary.] *Gargrave v. Every* is subsequent to *Lethbridge v. Chapman*. As to the manner in which some ancient statutes have been construed:—A more enlarged construction has always been given to them than to modern statutes wherein the language is more precise. This difference between ancient and modern statutes is remarked on by Lord *Ellenborough*, in *Wilson v. Knubley (e)*. If any argument is to be derived from the construction of statutes, it is in favour of the defendants. The 23 *Hen. 8*, c. 15, s. 1, and 4 *Jac. 1*, c. 3, which give costs to defendants on nonsuit or verdict, have been held not to give costs against executors *necessarily* suing in their *representative* character, as the statutes relate only to contracts made with, or money due to the *plaintiff (f)*. 6 *Geo. 4*, c. 50, sec. 34, which empowers a judge to certify for the costs of a special jury, has been held not to empower him to certify in case of *nonsuit*, *Wood v. Grimwood (g)*. 8 *Anne*, c. 14, sec. 4, which gives an action of debt for rent against a *lessee for life*, has been held not to extend to a *devisee* of a rent charge for life; *Webb v. Jiggs (h)*. The first section of that statute, which relates to the removal of goods by the sheriff in *executions* before payment of rent, has been held not to extend to seizure under *mesne process*; and in

(a) 2 Str. 907.

(b) 2 Salk. 425.

(c) 1 Lutw. 261.

(d) *Fitzgibbon*, 170. And see
 15 Vin. Abridg. 103, in Margin.

(e) 7 East, 128, 134; 3 Smith,
 123, S. C.

(f) Tidd, 992, 7th edit.

(g) 10 Barn. & Cressw. 689.

(h) 4 Maule & Selw. 113.

Brandling v. Barrington (a), Lord Tenterden said, "I cannot forbear observing that I think there is always danger in giving effect to what is called the *equity* of a statute, and that it is much safer and better to abide by the *plain words*, although the legislature *might* possibly have provided for other cases, had their attention been directed to them." The Court expressed a similar sentiment in their judgment in *Rex v. Shephard* (b). No words can be plainer than the words used in this statute. There is no room for doubt, no room for speculating upon the equity of the statute. The statute, in giving the action, enjoins the qualification. The action is altogether founded on the statute; and by the rule above alluded to, the plaintiff is bound to aver every thing which is requisite to entitle her to bring it. The inhabitants of the hundred are a fluctuating body, and the policy of the limitation is to confine the liability as much as possible to the inhabitants for the time in which the injury was done; and it would be in contravention of that policy to hold such an action as the present to be maintainable.

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Coleridge, Serjt., in reply. There are, no doubt, cases in which a strict construction has been put upon statutes. The Court will always look at the meaning and object of a statute as apparent upon the face of it, and if the act be of a *remedial* nature, will give full *effect* to that object. It is said that if this had not been made a felony, and the party had been permitted to enforce the previous civil remedy, he must have brought trespass *quare clausum fregit*, which species of action could not be brought by an executor. *Ejectione firmæ* and *ejectment* may be maintained by an executor, and are, in fact, actions of trespass; *Peytoe's case* (c), *Slade's case* (d), *Bro. Abr. Executor*, pl. 45 (e).

(a) 6 Barn. & Cressw. 467.

(b) *Post*, 185.

(c) 9 Co. Rep. 77 b.

(d) 4 Co. Rep. 93.

(e) Citing 7 H. 4, 6. (H. 7 H.

4, fo. 6, pl. 1,) in which *Hankford*, J., said, "The executor of tenant by elegit shall have trespass on the disseisin of his testator (upon 4 E. 3, c. 6.) So, here."

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Besides it is found in the case, that at the time the house was destroyed, goods and chattels were destroyed also. [*Addison*. It does not appear that there were any goods belonging to the testator.] Assuming that the defendant is right with respect to the principle of the decisions upon the statute of limitations, the present statute and the preceding statute (c. 30) must be taken to be one enactment, as they were both passed in the same session. A civil remedy existed:—By the first statute that remedy is taken away, and by the second another remedy is substituted. The substituted remedy must be construed to be as extensive as the former right of action. It is said that the principle upon which an executor is allowed to bring a second action cannot be that the statute of limitations has been satisfied by the bringing of the former action by the testator, for that if that were so, there would have been no occasion for the 4th section of the statute. But in all the cases mentioned in the 4th section, there has been an actual decision in favour of the plaintiff, though that decision has been afterwards rendered unavailing. [*Patteson, J.* They are all cases in which the judgment is no bar to another action.] It has been attempted to controvert the position, that the executor can bring a second action within a year after his testator's death. The position, however, is laid down in *Schwyn's Nisi Prius* (a) and in all the text writers, as undoubted law. [*Patteson, J.* If the bringing of an action by the testator within six years satisfied the statute of limitations, what authority had the Court to limit the second action by the executor to one year?] The limit of one year was fixed by analogy to the old law of journeys-accompts. If a writ abated without the default of the plaintiff or defendant, a new writ might be purchased from the Court of Chancery, and the second writ was held to be a continuance of the first. The second writ was to be sued out without delay, and the Court seem

(a) 7th edit. vol. i, 145, 146.

to have considered that the executor, although not within the law of journeys-accompts, was bound to use due diligence in bringing a second action, and that he did not use proper diligence unless he commenced the second action within a year^(a) from the death of his testator. In *Knight v. Bate* (b), Lord Mansfield appears clearly to have thought that there was some period of time within which the executor must bring his second action, where the first action has been brought within the prescribed period, and has abated.

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Cur. adv. vult.

On a subsequent day,

Lord DENMAN, C. J. delivered the judgment of the Court as follows.—Two questions arise in this case. First, Whether the executor of a termor can in any case maintain an action upon 7 and 8 Geo. 4, c. 31, s. 2, for an injury sustained in the life-time of his testator. 2ndly, Whether, if such action be duly commenced and prosecuted by the termor, and abates by his death more than three calendar months after the offence committed, his executor can bring a fresh action.


As we are all of opinion that the defendants are entitled to our judgment on the second question, it is unnecessary to consider the first.

This question depends upon the construction which ought to be put upon the following proviso contained in section 3. "Provided also that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence." The words of this section are plain; and it cannot be pretended that the plaintiff is brought within the letter of the enactment. But the question is, whether the plaintiff may bring this action by analogy to the decisions

Second point.

(a) A year, or rather a year and a day, appears to have been considered by the common law as a reasonable time for a great variety of purposes.

(b) 2 Cowp. 738.

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on the general statute of limitations (a), under which an executor is held to have a year to commence a fresh action after the death of his testator, though the time of limitation may in the intermediate time have elapsed. In order to ascertain whether such analogy can assist the plaintiff, it is necessary to consider the *grounds* upon which the decisions on the statute of limitations have proceeded. In *Kinsey v. Heyward* (b), Treby, C. J., in giving his judgment, intimates that when *once* the proviso in that statute is complied with by the commencement of an action within due time, "the party is *out of the purview* of the act," and "set at liberty *out of the restraint* of the statute." But it is plain, that if such were so, the 4th section, which enables a plaintiff, his heirs or executors, to bring a fresh action within a year, where the judgment has been arrested or reversed on error, or the defendant has been outlawed and has reversed the outlawry, would have been unnecessary. And again, if "the party were set at liberty *out of the restraint* of the statute," the *Court* could have no *power* to restrict the bringing of the fresh action to *any* given time; which restriction, however, was imposed in the same case of *Kinsey v. Heyward*. We think that the true ground of such decisions is rather to be collected from what is said in *Wilcocks v. Huggins* (c), viz. that they proceed upon the *equity* of the 4th section; and that the Courts have extended that section to the case of an executor whose testator has died pending an action brought by him, which, though not within the words of the section, was evidently within the mischief intended to be remedied. The restriction imposed by the Courts, of *a year*, leads strongly to such a conclusion, and cannot be accounted for by reference to the old doctrine of journeys-accompts, which is not applicable where the *plaintiff* in an action dies (d).

(a) 21 Jac. 1, c. 16, sec. 3 & 4.

(b) 1 Lord Raym. 432.

(c) 2 Stra. 907.

(d) Acc. per Lord Coke in *Spencer's*

case, 6 Co. Rep. 10, and per Treby, C. J. *Anon.* 12 Mod. 229.

But Lord Coke refers to three cases as supporting this position,

This being the case, it becomes necessary to see whether there be any provision in 7 & 8 Geo. 4, c. 31, which gives the plaintiff power to commence a fresh action under circumstances similar to those stated in 21 Jac. 1, c. 16, s. 4, upon which any such *equitable* construction can be placed. None such has been found; and we cannot decide this case in favour of the plaintiff without holding, that in all cases where an act of parliament gives an action to a party grieved, to be commenced within a certain time, and such action is commenced within the time, and either the action abates by death of the plaintiff, or judgment is arrested or reversed, a fresh action may be brought *after* the limited time; a proposition for which we cannot find any authority. In this instance also there is still less ground for so holding, because the action lies not at common law, and can only be maintained by virtue of the act of parliament, in which

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all of which are cases of abatement by the death of the *tenant or defendant*, and in all of which the writ by journeys-accompts was *allowed*, and nothing was said as to the death of the *plaintiff*; and Lord Treby refers to Rastell, 417, 107, and Cro. El. 174,—*Rastell* being silent as to *plaintiff*,—and the case in Cro. Eliz. 174 (*Walter Moile's case*) being as follows—
“*Cooper* moved that *W. M.* had brought a quare impedit, and died pending the writ; and he prayed to have another writ by journeys-accompts for his executors; for he said he could not have it but by the allowance of the Court. And the Court *granted* it, but said ‘regard well, if it lieth in this case or not, and in what form the writ shall be.’”

In *Wilcocks v. Huggins* (*ante*, 148, 150), as reported in Fitzgibbon, 280, Lee, J. says, “I think it (the action by the executor on a

bill of exchange after an action abated by death of testator) should be in the nature of journeys-accompts, which is a taking up and pursuing of the old action in a reasonable time, which is to be discerned by the discretion of the justices.” And in 1 Brownl. Rep. 158, it is said, that in quare impedit, a writ by journeys-accompts lies upon the death of the *testator*.

Where an action has abated by the death of *one* of several plaintiffs or demandants, the survivor may sue out his writ of journeys-accompts. So, where the first action abates by the death of *one* of several defendants or tenants. Whether this process lies upon the death of a *sole* tenant or defendant, does not seem to be equally clear. Vide *Dayrell* and *Thinn's case*, 1 Leon. 22; F. N. B. 32 C; Bro. Abr. *title* Journeys-accompts; Com. Dig. *tit.* Abatement (P.); *post*, 158 (b).

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the time of commencing it is made a condition precedent. As to *Knight v. Bate* (a), that was a case in which the same plaintiff sued the representative of the original defendant, and to which the doctrine of journeys-accompts might possibly apply (b); and indeed the decision in that case was against the plaintiff on account of the *too great* lapse of time. Upon the whole, therefore, we are of opinion that judgment must be entered for the defendants.

Judgment for the defendants.

(a) Cowp. 738.

(b) *Dionise la Rivere* brought quare impedit against *The Prior of St. John of Jerusalem*; and upon plenary before action brought being pleaded, replied a former writ sued out against the defendant's predecessor, and continued by journeys-accompts, P. 10 E. 3, fo. 16 a, pl. 5. But in 8 H. 5,

fo. 6 a, pl. 22, *Babington*, C.B. appears to have considered that in every case where a suit had abated by the act of God, a writ by journeys-accompts might be sued out. The reason that no cases occur of such writs being sued out by executors, may be, that there were few cases, where executors could sue, in which time was material.

The KING v. HENRY WYNDHAM GWYER and SAMUEL MANLEY.

A parishioner, rated only in one of three rates made during a particular year, but afterwards continuing to be a regular rated inhabitant, is entitled to appeal against the accounts of the overseers for the *whole* of that year, and may object to the allowance of charges for the making and collecting of those rates to which he was not himself assessed:

An overseer cannot charge the parish with a sum *bonâ fide* paid by him to other persons for making a poor-rate.

Nor can he charge a sum so paid for making two divisions of the same.

Nor, a sum paid for making a copy for collectors.

Nor, a sum paid to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters.

Nor, a poundage paid to persons employed in collecting the rates.

Although it is found by the sessions that the charges are fair and reasonable, and that the overseers required assistance.

Nor can a vestry, even though all the then-rated inhabitants be present, authorize the overseers to charge the parish with such expenses.

APPEAL against the accounts of *Henry Wyndham Gwyer* and *Samuel Manley*, two of the overseers of the

parish of Bedminster, Somerset, for the year commencing 25 March, 1832, and ending 25 March, 1833. The appellant was a parishioner of Bedminster, and rated in the second only of three rates made during the year. The first rate was made 26 April, 1832; the second, 4 October, 1832; and the third, 11 February, 1833. The appellant was also rated 25 March, 1833, and from that time to the time of the appeal. Some of the items objected to in the notice of appeal, and which were disallowed by the sessions, were the following:—

6*l.* 6*s.* for making the second and third poor-rates.

5*s.* for making two divisions of the same.

3*l.* 10*s.* for making a copy of the said rates for the collectors.

12*l.* 6*s.* paid to accountant for examining, making up, and entering the accounts of the year, and a list of defaulters in the three rates.

66*l.* 19*s.* 9*d.* paid poundage for collecting 2679*l.* 14*s.* 6*d.*

33*l.* 1*s.* 3*d.* paid poundage for collecting 1984*l.* 2*s.* 9*d.*

11*l.* 13*s.* 6*d.* paid poundage for collecting 467*l.* 3*s.* 11*d.*

The parish is twenty-one miles in circumference, and contains a population of thirteen thousand persons. The sums collected for the relief of the poor amounted in each year to 8000*l.* and upwards. In the year, from March, 1832, to March, 1833, there were, as usual, two church-wardens and four overseers. Before this year the parish had an *assistant* overseer, but there was no evidence of his appointment. The parish had employed an accountant to make up their accounts; and when a new rate was made the accountant was employed to draw out a list of defaulters, and such lists, for the three rates made in this year, occupied 150 folio sheets. In this year the vestry allowed a clerk a salary of 50*l.* to assist the overseer; but it was no part of his duty, as clerk, to do any business for which any of the sums above mentioned are charged. The affairs of this parish are managed by a common-law vestry; and at a

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vestry duly held on 2 April, 1832, the vestry came to the following resolution.

“That in the present embarrassed state of the parish no assistant overseer or overseers be elected, but that power be given to the present overseers to call in what assistance they may stand in need of.”

This was signed by the chairman of the meeting, and remained in the book in which the resolutions of the parish were generally entered, and which each parishioner had power to inspect. Under the authority of this resolution, the several sums hereinbefore mentioned were expended by the overseers,—who required assistance. The sums charged for poundage were paid to collectors for collecting moneys due on the three rates.

Besides the general resolution before mentioned, the vestry, duly held on 9th September, 1831, came to the following resolution, which was entered in the same book.

“Resolved, that Mr. *Harpur* be paid and allowed at the rate of 6*d.* in the pound upon all sums collected,—including the expenses incident to proceedings before magistrates,—and that the same be allowed in the overseer's accounts.”

This resolution has never been rescinded; and *Harpur* collected the rates, and was paid such poundage up to the 4th October, 1832; and he also collected the first rate, and received, as poundage, the sum of 66*l.* 19*s.* 9*d.*

On 4 October, 1832, at a similar vestry it was resolved, that a rate of 4*s.* in the pound should be granted to the overseers for the relief of the poor; and that the sum of 4*d.* in the pound should be allowed to the overseers for collecting the same. The rate was collected by certain collectors, who received for their labour the above sum of 33*l.* 1*s.* 3*d.*,—being the amount of 4*d.* in the pound on moneys collected by them upon the said rate.

21 February, 1833. At a meeting of the same vestry, it was resolved, that Mr. *James Blake* and Mr. *John Hurford* should be appointed collectors for the third rate for the then present year, and that they should be respectively paid

the sum of 6*d.* in the pound on the amount of their collection, and that the sum should be allowed in the then overseer's accounts." The appellant was present at this meeting, but did not sign the resolution.

Under the sanction of this resolution *Blake* and *Hurford* collected the third rate, and received 1*l.* 13*s.* 6*d.*, being the poundage on their respective collections.

All the sums hereinbefore mentioned were paid by the overseers to other persons for work *bonâ fide* done, and the charges are reasonable and fair.

The question for the opinion of the Court is, whether, under any of these resolutions or otherwise, the overseers had any authority to include these items, or any of them, in their accounts. If they had no such authority, the order of sessions to be confirmed. If they had such authority, then the order of sessions for disallowing the same to be amended, by allowing such items as the Court shall think the overseers had power to order.

Jeremy and *Moody* in support of the order of sessions. The charges disallowed by the sessions were illegal; being for sums paid by the overseers for the doing by deputy that which it was their duty as overseers to perform personally. The circumstances of the sums having been paid for work *bonâ fide* done by others, and of the charges being *fair* and *reasonable*, are immaterial. The fact of their *requiring assistance* is also immaterial. The law has thrown upon the overseer certain duties, and he is bound to perform them personally; or if he requires assistance, then he is bound personally to bear the expense of having such assistance. Nor is it material that the vestry had, in point of fact, authorized the incurring of these expenses, for the vestry had no power by law to do so. If it is deemed expedient in any parish to call in assistants for the purpose of aiding the overseers in the execution of their office, such assistants (*a*)

(a) As to assistant overseers, see *Ryl.* 432; 7 *Barnw. & Cressw.* 586.
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must be elected and appointed in the manner directed by 59 *Geo.* 3, c. 12, s. 7(a). Charges for *law expenses* incurred by the overseers are allowable on the ground of necessity, arising out of the statute of 13 & 14 *Car.* II. c. 12. Items such as those which the sessions have in this case rejected from the overseer's accounts, have never been allowed by the Court. There were cited, in the course of the argument, the cases of *Rex v. Welch* (b), *Rex v. Glyde* (c), *Rex v. The Earl of Ashburnham* (d), *Rex v. St. Peter's, Chichester* (e), *Rex v. Bird* (f), and *Rex v. Essex* (g).

Rogers and Bere, *contra*. Three points must be decided by the Court, before this order of sessions can be confirmed; viz. that the resolutions of the vestry are not *binding* upon the parish;—that *all* the items disallowed relate to the duty and office of overseers; and that a party *not rated* at the time of the expenditure can be a *party aggrieved*, so as to entitle him to object to the allowance of items in the overseers' account charging such expenditure to the parish. If any *one* of the items disallowed be a legal item, or if any one have been rejected by the sessions upon the objection of a party not entitled to appeal, the order of sessions cannot be confirmed.

(a) Which authorizes the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers, and to determine and specify the duties to be by him performed, and to fix such yearly salary as they shall think fit; and empowers any two justices, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers, for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry, such salary to be paid out of the poor-

rates. The section then enables the assistant overseer or overseers so appointed to perform all such of the duties of overseers of the poor as shall be expressed in the warrant of appointment; and empowers the inhabitants, upon the nomination and election by them of such assistant overseer or overseers, to take security from him or them for the faithful execution of his or their office.

(b) 1 Bott's P. L. pl. 354.

(c) 2 Maule & Selw. 323, n.

(d) 2 Nolan, P. L. 369.

(e) 1 Bott, 31.

(f) 2 Barn. & Alder. 599.

(g) 4 T. R. 591.

I. The resolutions of the vestry are binding upon the whole parish. The vestry in this parish was a common law vestry, that is, an assembly of the whole parish met together, for the dispatch of the affairs of the parish. The majority present at such a vestry have power to bind the whole parish, when the thing resolved upon by such majority is not in itself positively illegal; 4 *Burn's Ecclesiastical Law*, 9; 4 *Viner's Abridgement*, 525; *Rogers v. Davenant*(a); *Wilkinson v. Malin*(b). If the vestry had, in this case, authorized an extravagant expenditure by the parish officers, it might, nevertheless, have been disallowed upon appeal against the overseer's accounts. Here the sessions have found that the assistance charged for was *required*, and the charges were fair and reasonable. Some of the cases cited on the other side shew that a vestry cannot appoint officers to assist the overseers at *fixed salaries*, more especially where the full number of two churchwardens and four overseers have not been appointed; but they do not establish the position that a vestry cannot authorize the incurring expense for such *incidental assistance* as may from time to time be requisite for the due performance of the duty of the overseers.

II. The charges disallowed are not all of them for the performance of duties which the overseers are bound to perform *by themselves*. Some of the items are for things done for the benefit of the parish, which an overseer would not be bound to do in his own proper person. The parish had, in this instance, availed themselves of all the gratuitous service which the law puts within their reach; for they had appointed the full number of two churchwardens and four overseers, and it is found by the sessions that the several sums disallowed by them were paid by the overseers, *who required assistance*, for work *bonâ fide* done by other persons. This expenditure was, therefore, *necessarily* incurred by the overseers in the execution of their office; and they ought, therefore, as in the case of law expenses, to

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First point:
Whether
parish bound
by resolutions
of vestry.

Second point:
Whether
charges for
matters relating to duty
and office of
overseers.

(a) 1 Mod. 194.

(b) 2 Crompt. & Jerv. 653.

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Competency of
party to appeal.

be reimbursed by the parish. The cases which have been cited *contra*, are all distinguishable.

III. The appellant was not entitled to object to the allowance of items of expenditure charged upon rates to which he did not contribute. It appears from the case that the appellant was assessed in one only of the three rates made during the year over which these overseers' accounts extended. The act (a) gives the right of appeal against a rate to any person aggrieved by it, or objecting to any persons being put in, or left out, of the rate, or to the sum charged on any person therein, or by any thing doing or omitted by the overseers or justices. It has been held that a *stranger* is not entitled to the appeal which is given by this act; and such, except only as to one of the rates to items in the expenditure of which he objects, the appellant in this case was.

Lord DENMAN, C. J.—The first objection taken is, that the appellant was not a rated parishioner during the *whole* of the time over which the accounts of these overseers extend. It appears that he was a parishioner during a part of the time only, and rated in only one of the rates made during the year; but that he was rated on the 25th March, 1833, and from that time to the time of the appeal.

Now the question is, whether he can be heard at all to object to items of expenditure supposed to be chargeable upon those rates that were levied during the period when he was not a parishioner. It appears to me that he is at liberty to do so, for he has an interest in the expenditure of the money in the hands of the overseers, inasmuch as his own assessment will be larger if the surplus that should remain after the former assessment is reduced, below what it would otherwise be, by illegal payments. I therefore think that if there is a good ground of appeal against the accounts, a party who is a rated inhabitant, is not precluded from appealing by his not being rated for the same period.

(a) 17 Geo. 2, c. 38, s. 4.

Then the question is, whether the sessions have done right in disallowing the expenses in question. (His lordship here enumerated the items stated in the case.) There are some circumstances stated which go to make it appear extremely reasonable that the overseers should be allowed expenses of this nature, or some of them, if not all; but the question, in the first place, is, whether they had *any power* to charge such expenses against the parish. A case may very easily be supposed, in which a very heavy burden is cast upon overseers in the execution of their office; but still, unless the law has made some provision for their being paid for during that duty, they must do it gratuitously. I cannot distinguish in principle between a refusal by the Court to allow overseers to receive *a salary* for doing work which the law requires them to do without gratuity, and a refusal to allow them to employ other persons to do the work at the public expense.

The two cases amount to the same thing in principle. If overseers cannot be allowed a salary, neither can they be allowed to employ another person at a salary, for they cannot do obliquely what they are not allowed to do directly. *Rex v. Welch*, *Rex v. Ashburnham*, and the other cases referred to, are, I think, not to be got over. Those cases, and especially what fell from Lord Tenterden in *Rex v. Glyde*, are quite clear and decisive upon the point.

But then it is said that the *parish* have *authorized* this expenditure; but in the cases which have been cited, and particularly in *Rex v. Welch*, the vestry had, in the same manner, in point of fact, sanctioned the expenditure which was afterwards disallowed. It is not properly *within the jurisdiction* of a vestry meeting, though duly assembled, to tax all the parishioners in this manner. It is impossible to make this a matter of contract, and say, that because the vestry voted that the overseers should be allowed to expend this money, and to insert the items in their accounts, the overseers have a right so to do against any person who, not having been a consenting party to that vote, thinks proper

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afterwards to appeal against it. It is true that the majority of a vestry may bind the minority, but that is only in matters within the jurisdiction of the vestry at large. The vestry has not the power to impose burdens and taxes of this kind on the rest of the parish.

It is not (nor was it possible that it should be) contended, on the part of the officers, that they can bring themselves within the 7th section of the 59 Geo. 3. It is unfortunate that the parish have not appointed an assistant overseer with a salary, under the authority of that section. Such would have been the most wise and most prudent course for the parish to pursue.

These expenses,—however *reasonable* the charges may be,—however *necessary* the incurring them may have been,—however much it may have been for the *benefit* of the parish that they should be incurred, are not such as the overseers are entitled by law to charge to the parish.

TAUNTON, J.—I cannot but regret, in this particular instance, that the overseers are not entitled to reimbursement, because it is found that the charges are fair and reasonable, and that the different items of charge were *bonâ fide* incurred. Whatever may be our *feeling* upon the subject, the items cannot be allowed if the Court sees that they are not necessarily connected with the execution of the office of the overseers. In the book before me (the Law of the Relief and Settlement of the Poor, by Mr. *Wilcocks*,) I find this stated, which appears to me to be extremely correct and very neatly worded. “They (overseers) are entitled to charge in their accounts whatever they have spent for the parish under the direction of any statute, order of justices, or legal process; whatever they have *bonâ fide* and legally disbursed in relieving paupers, where it was their duty to relieve, in providing stock for the children of indigent parents, and persons having no means of gaining a livelihood, in the disposal of stock for these purposes,—for the costs of orders of maintenance or removal, or of an appeal,

though decided against them, unless they have been guilty of gross misconduct or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity,—in repaying the legal disbursements of constables, and all other money fairly laid out in the business of the parish.”

Then, with respect to constables, he puts instances by way of illustration: “They may charge what they have legally paid a constable in the parish account, such as the expense necessarily incurred in relieving and conveying vagrants, but not the expense incurred by a constable in bringing an action which he is not required by the statute or directed by the vestry to prosecute. They may charge the amount of a salary granted to an assistant overseer appointed in pursuance of the statute, but not to an assistant overseer otherwise appointed; nor can they charge a salary, or any other remuneration for their own services, but *merely such expenses as they have necessarily incurred in the execution of their office.*”

All these different propositions which I have read from this book, appear to be supported by the cases which are there cited, particularly those cases which have been mentioned in the argument to-day. Now, it appears to me, that none of those charges relate to that part of the personal duty of overseers which it was utterly impossible for them to discharge without assistance. I apprehend it to be clear that it was the business of the overseers to *make the rates*, and not to employ some other person, an accountant &c., for that purpose. It would be a different thing if, in order to make the rate, the vestry should order the parish to be *surveyed*, and order the expenses of that survey to be paid. I think that it is also a part of the personal duty of the overseers to *collect* the rate; and therefore the charge for poundage appears to me to be altogether without authority. When a public officer is called upon by statute to do particular items of duty, he must do them, and unless the statute gives a gratuity, he must do them without fee or

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reward. No office can be more burdensome than that of sheriff, yet the sheriff is not entitled to one single farthing more than that which the different statutes relating to the execution of his duty give him. And this has been decided in cases in which the not allowing a greater amount of remuneration has evidently been a great hardship upon the sheriff.

Now the act does not give any gratuity for these duties which have been performed here; and however fair and reasonable the charges may be, and however *bonâ fide* they may have been incurred, and although it may turn out ultimately upon investigation that it was for the benefit of the parish that this business should be done in the way in which it was done, and that the parties should be paid, yet still that will not entitle the overseers to remuneration.

PATTESON, J.—The sessions have found that all the sums were paid by the overseers to other persons for work *bonâ fide* done, and that the charges are reasonable and fair; and it is also found that the overseers employed those persons by the desire of the vestry. The overseers, therefore, seem to have acted altogether *bonâ fide*, and there is no pretence for saying that the charges which they have made are unreasonable or improper on their part, much less that they are dishonest. But if the vestry had no power to authorize them to act as they have done, they must be in the condition of all persons who act under those who have no authority to put them in motion, and they must take the consequences of not ascertaining sufficiently whether the vestry had authority or not.

Now I cannot distinguish this from the cases which have been cited, particularly *Rex v. Welch*. I cannot see how it was more illegal to appoint an *assistant overseer*, as in that case, than to appoint *collectors*, who are to receive a per centage; one is no more illegal than the other, for they are both unauthorized. They seem to me to stand upon the same footing. Then it is argued that the ground of

the decision, as to law expenses, applies to all cases where expenses are *necessarily* incurred by overseers in the execution of their office. I am not prepared to say that, supposing any case could be put in which a duty is cast upon overseers, which they must *necessarily* perform, not by their own hands, but by employing others, at a certain expense, they might not include that item of expense in their accounts; but the point does not arise here, because every one of these items is for the performance, by others, of things which the overseers *might* have done themselves, in their own proper person, though no doubt at great inconvenience and trouble. I do not see, therefore, how these are *necessary expenses*.

With respect to the argument, as to the power of the vestry to bind the parish; it is clear that a majority of the vestry, assembled for *any legal purpose*, may bind those who are absent; but here they had no power at all, even if every then inhabitant of the parish had been present.

Then the only point that remains is, whether or not the present appellant can be heard? Now if this were an appeal against the particular rates to which he was not assessed, there would be considerable weight in the objection. It no-where appears out of what particular rates the accounts are to be paid. The sums were paid generally in the course of the year,—out of what rates we do not know. It appears that a per centage was allowed on the collection of the rates. That per centage may have been either *retained* by the collector out of *the particular rate*, or not—I do not know. But even if it had been *retained*, that illegal allowance may have imposed the necessity of levying a larger sum in the next rate.

WILLIAMS, J.—I am entirely of the same opinion. All these items, without exception, are open to objection; because they are contrary to the provisions of the act, which specifies the objects and purposes for which the rate is to be imposed; viz. for the *relief of the poor*, and so on. All

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the earlier cases have gone strictly upon the ground that the assessment so made must be applied in that direction and in no other, unless a different mode of applying a portion of it be authorized by some particular act of parliament: and I have waited to hear what authority there was in this particular case for deviating from the appointed application of the fund so collected and for such purposes, and none such has been cited.

I think also the appellant may have had an interest, inasmuch as it does not appear out of what assessment the disbursements have been made.

Order of Sessions confirmed.

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Upon a bailment without reward, in order that an act may be done by the bailee for the sole benefit of the bailor, such bailee (or mandatary) is liable only for gross negligence.

What shall amount to gross negligence is a question for the jury.

An admission by an inn-keeper that he left money entrusted to him for the purpose of taking up a bill, in

his cash-box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury.

CASE, for not taking up a bill for 32*l.* 10*s.* with money which the plaintiff had given to the defendant for that purpose. The declaration contained a count for negligence in losing 32*l.* 10*s.* entrusted by the plaintiff to the defendant's care. Plea: the general issue. The cause was tried at the sittings after Michaelmas term, 1833, before Lord Denman, C. J. at Guildhall. The following evidence was given on the part of the plaintiffs: The defendant kept the Auction Mart Coffee House, which consisted of a coffee-room and several private apartments, together with a tap-room having a bar. The plaintiff was in the habit of frequenting the coffee-room, and on Saturday, 21st July, 1833, gave the defendant 32*l.* 10*s.* for the purpose of taking up a bill which would become due on the following Monday. There was *no consideration* for the bailment or for the service. The tap-room was kept open on Sundays,—the coffee-room was closed on that day.

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The bill was not on the Monday paid by the defendant, as he had engaged to do, nor was the 32*l.* 10*s.* returned to the plaintiff. The defendant had *stated* to one of the witnesses called by the plaintiff, that on the intervening Sunday (22 July) he had *unfortunately* left his cash-box in the tap-room, and that the plaintiff's money, *together with about 200*l.* of his own*, had been stolen (a). No evidence was given as to the *part* of the tap-room in which the cash-box had been placed, nor as to the manner in which it had been secured. Sir *James Scarlett*, for the defendant, applied for a nonsuit, on the ground that there was no evidence of negligence such as to charge a *bailee without reward*; and he cited *Coggs v. Bernard* (b) and *Skidels and another v. Blackburne* (c). The lord chief justice, however, refused to nonsuit, and the case went to the jury without any evidence on the part of the defendant. His lordship told the jury, that as the money had been deposited *without reward*, the question was, whether the defendant had been guilty of *gross* negligence in respect of the custody of the plaintiff's money, or whether he had used *ordinary* care; and that gross negligence only would give the plaintiff a right to recover the sum deposited. His lordship expressed it as his opinion that *gross* negligence was not *in fact* proved, but this point being left to the jury, they found a verdict for the plaintiff for 32*l.* 10*s.* Sir *James Scarlett*, in the following term, obtained a rule nisi for a nonsuit or a new trial; against which,

Campbell, A. G. and *R. V. Richards* shewed cause. It is admitted that, according to the rule laid down by Sir *William Jones* (d), "a bailee who derives *no benefit* from

(a) This statement, though made by the defendant himself, was admissible in evidence, because it formed part of the conversation of which the *plaintiff* gave evidence. As to how far the statement was evidence of the fact, see *Randall v.*

Blackburn, 5 Taunt. 245. But see *Remmill v. Hall*, Mann. Dig. 2nd edit. 376.

(b) 2 Lord Raym. 909.

(c) 1 H. Bla. 158.

(d) Jones on Bailments, 119.

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his undertaking is responsible only for *gross neglect*," and that nothing, therefore, short of *gross negligence* could in *this* case have given the plaintiff a right to recover from the defendant the money bailed. But the question whether the bailee *has* been guilty of gross negligence, is a question of pure *fact* which falls entirely within the province of the jury. The jury *have* in this case found gross negligence, and their finding is well warranted by the evidence. According to the defendant's own statement, he *unfortunately* left the box in the tap-room, which is an acknowledgment of *negligence*; and, considering the character of persons frequenting such a place, it is an admission of *gross negligence*. It does not appear but that the box was left by the defendant *unlocked* and in the most *exposed* part of the room; and the fact of the defendant's having at the same time lost property of *his own* to a large amount, is not of itself an answer to the plaintiff's claim, but is merely a fact to go to the jury upon the question whether the evidence sustains a charge of gross negligence. *Shiells v. Blackburne* (a) was cited by Sir James Scarlett, as shewing that a bailee without reward, who takes the *same care of the goods of the bailor as of his own*, and loses both, is not liable to an action for a loss of the goods of the bailor. The *marginal note* to that case might seem to warrant a supposition that it was so decided, but neither the *facts* of the case, nor the language of the *judgment*, supports such a position. The judgment proceeded on the ground that there was *in fact* no gross negligence,—not upon the fact of the defendant's having lost his own goods at the same time with those of the bailor.

Sir J. Scarlett and Comyn, *contrà*. The defendant's counsel laid down no proposition of law whatever, but only insisted that it was incumbent on the plaintiff to establish a *clear* case of gross negligence; and that it was not, as the plaintiff's counsel contended, the duty of the defendant

(a) *Suprà*, 171.

to discharge himself by negative evidence from a *presumption* of gross neglect arising out of the fact of the loss. *Shiells v. Blackburne* (a) fully establishes this position. [Lord Denman, C. J. Must the judge define the meaning of "gross negligence," or—some negligence having been proved,—must it be left to the jury to say whether the negligence which has been proved, is *gross* negligence or not?] In *Shiells v. Blackburne*, the jury having found for the plaintiff, the Court decided that there was no case of gross negligence. This may be assimilated to the case of an action against an attorney for negligence, in which *crassa negligentia* must be proved satisfactorily to the Court. It is a part of the very essence of the liability, so that without gross negligence the liability cannot exist. In *Shiells v. Blackburne*, Wilson, J. said, "Where the undertaking is *gratuitous*, and the party has acted *bonâ fide*, it is not consistent either with the spirit or the policy of the law to make him liable to an action."

The verdict is certainly against the evidence; and upon this point, the fact of the defendant's having risked a much larger sum of his own than that which belonged to the plaintiff, is a strong circumstance.

TAUNTON, J.—This case is certainly one of some degree of doubt, but after the best consideration I can give the question, I have arrived at the conclusion that the rule ought not to be made absolute. It is very properly admitted that this being a case of bailment for the benefit of the *bailor* without *reward* to the *bailee*, the present action cannot be maintained without proof of gross negligence; therefore the only question is, whether there was *any evidence*, for the consideration of the jury, of negligence of that description? Now if there was *any evidence* for the jury, it is perfectly clear that the application for a *nonsuit* cannot be supported, and it is to my mind also pretty clear that the decision of the jury ought to be final.

(a) *Supra*, 171.

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Much has been said about the nature of *gross* negligence—whether it is matter of law or matter of fact. I do not think it necessary to enter into that abstract question; indeed, I think *abstract* questions in general are very dangerous matters to meddle with in a Court of Law. That question, like all other questions, must depend on all the circumstances of the case considered together. There certainly may be instances in which the question of gross negligence consists more of law than of fact, and others in which it consists more of fact than of law. In the case of an action against *an attorney* for negligence, the question is rather matter of law than fact, for this reason, that an action against an attorney for negligence charges that the defendant being an attorney, and having undertaken to do such and such business, was guilty of such unskilfulness or such negligence in the management of it, that such and such injurious consequences resulted to the plaintiff. There it would be impossible for the jury, in nineteen cases out of twenty, to come to any conclusion without being informed by the *Court* that the negligence or mismanagement of the defendant was necessarily, in point of law, attended with such injurious consequences, so that there it consists rather of matter of law than matter of fact. But still, even in that instance, I apprehend, the jury are to draw a conclusion of fact, whether the attorney was guilty of that negligence or that mismanagement which is charged, and which is the gist of the action. In an action against *a surgeon*, for negligence, it is more matter of fact than of law; for what law can there be in the question whether of such and such conduct, charged to be mismanagement or negligence, the defendant was or was not guilty? That is a matter for the consideration of the jury, who, upon hearing the evidence, must draw their own conclusions from it; so that there it is more matter of fact than matter of law. Here I should say, under all the circumstances, that the question was a matter of fact to be tried by a jury, more than matter of law. The cir-

cumstances are extremely simple—This defendant received a sum of money to be taken care of, to be securely kept by him for the benefit of the plaintiff. What is the care or carelessness which he exercises? Being the keeper of a public-house, he puts this with money of *his own* (which I think is a perfectly *immaterial* circumstance) in a box in the *public tap-room* of this public-house. The evidence is certainly not so clear and explicit as it might be, because it would be much more satisfactory, in adopting a conclusion either the one way or the other, to know in what *state and condition* that box was; to know in what *part* of the tap it was placed, and what *access* strangers had to it; because I should think that if it had appeared that the defendant had put it into a *box* and locked that box, and put it into a *safe place* in the tap-room, there would have been no negligence; because a thief might then as well have got to it in an upper chamber of the house as in the tap-room, though certainly there would be greater *opportunity* for the money being stolen in the public tap-room than in a private chamber; but I am not prepared to say, if the money had been properly secured in the tap-room, that any negligence could be justly chargeable against the defendant. But it is contended that this is not *primâ facie* evidence of negligence, calling for an answer at the trial. Now if there was no negligence under the circumstance of leaving this in the tap-room,—if it was taken proper care of, and locked up,—the defendant had the best knowledge of those circumstances, and might have proved them, thereby exonerating himself from the present action. I think it must be taken, in the absence of any such proof, that such proof *was not* given because it *could not* be given. I think therefore that there was, under all the circumstances of this case, a *primâ facie* proof of gross negligence. Gross negligence differs only in degree from *common* negligence; it only means a *greater degree* of negligence, as contra-distinguished from the *common degree* of negligence. Sir James Scarlett has cited a case which has certainly raised some degree of doubt in the

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mind of the Court—I mean *Shiells v. Blackburne*. It is argued that in that case the Court treated the matter as a question of law, and that they set aside the verdict because they were of opinion, in point of law, that what was alleged against the defendant (that he entered the goods as *wrought* leather instead of *dressed* leather) was a question of law, and the jury, having mistaken the law, gave a wrong verdict. I do not view the decision in that light; I think that decision was nothing more than this—that the jury came to a conclusion upon the circumstances there proved, that the defendant had been guilty of gross negligence, and not a venal mistake; which conclusion, the Court were of opinion, was a *wrong conclusion* drawn from the circumstances of the case. They seem to have thought that a merchant's making a *mistake* like that, was, in point of fact, not to be considered as *gross* negligence, and under that conclusion they set aside the verdict of the jury, which ~~was~~ founded on an opposite view of the circumstances. That case, I think, will not stand against the conclusion to which I have come. Undoubtedly it does not appear from the report of that case, how it was treated at the *trial*, or what was the *direction* to the jury. The report merely states the declaration, and that a rule had been prayed, and then gives the arguments of counsel;—but I do not think there is any thing in that case which lays it down as a rule that in every instance the question of negligence is to be considered a matter of *law*, not a matter of *fact*. Undoubtedly, in point of practice, whether it be right or wrong, the usual course of proceeding is to put it to the jury, whether they think there is such a case of negligence proved as entitles the plaintiff to a verdict, that is, such a case of negligence as the plaintiff has alleged in his declaration; for if negligence were not sufficiently alleged, the defendant might move in arrest of judgment, but the jury are to say whether the facts charged are proved.

I think, therefore, in this instance, that it is a matter of fact which has been determined upon by the jury. It is not necessary to decide any thing upon the *law* of the case

more than to say that the conclusion to which the jury have come is a *right* one.

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PATTESON, J.—This being an action against a bailee *without reward*, it is admitted on all hands now (which, I confess, when the rule was moved for I thought was not the case,) that the defendant cannot be liable unless he is guilty of gross negligence. There is therefore no dispute about the law. The difficulty which arises is as to what is gross negligence; and (for that is the material point) who is to decide that;—whether it is a question for the *jury*, or whether it is to be decided by the *Court*. If it is a question to be decided by the *Court*, and there was no evidence to satisfy the mind of the judge that there was *gross* negligence, of course there ought to be a nonsuit, though it does not appear that the question of the nonsuit was reserved. If, on the other hand, it was a question for the jury, I cannot entertain any doubt but that there *was* something here to go to the jury. I quite agree that the evidence must be given by the *plaintiff*; that the *onus* lies on him to shew that there was gross negligence. But there certainly was *some* evidence for the jury; because it appears, by the admission of the defendant himself, that the money had been committed to his charge, and that it had been lost, together with some of his own, having been *unfortunately* left in a box in the tap-room on the Sunday, when it was lost; which tap-room, it seems, was open on a Sunday, all the rest of the premises being shut. Now, if the *jury* are to determine the question, it seems to me that these *are* facts which must go to them for their determination. Therefore I think it is quite clear there cannot be a nonsuit.

Now, upon the abstract question, whether, in general, negligence is a question for the jury or for the Court, I do not think it necessary for us to come to any determination in this particular instance, because this is a question unmixed with any point of law of any kind; and being a question as

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to the conduct of a party in the *ordinary course of transactions*, it seems to me, that in this particular case, at all events, it was a question for the *jury*.

The general question, I confess, is one which I approach with great difficulty. Indeed I do not know any question more difficult than, where, upon what are called *mixed* questions of law and fact, the province of the jury ends, and that of the Court begins. It is exceedingly difficult; and I should be sorry to be supposed to lay down any rule upon the subject on this occasion. The doubt which has been raised in my mind has been principally occasioned by the case of *Shiells v. Blackburne*, which at first I could not distinguish from this; because it seems there that the facts which were proved in evidence admitted of no dispute, viz., that the defendant had been employed, without reward, to make a certain entry at the custom-house; that he made that entry of the goods of the plaintiff along with goods of *his own*, and had made it wrongly, by reason of which all the goods were seized; and therefore, whether the defendant was liable or not, must have depended on the question whether these acts amounted to gross negligence. Now, if the jury were the persons to whom that was left in the first instance, we do not know under what *direction* it was left; for the report only says that a verdict was found for the plaintiff, but it does not say what direction the judge gave, or whether he deemed the facts to amount to evidence of gross negligence. What he did on the occasion does not appear in the report. All that appears is, that upon the matter being brought before the Court, on a motion for a new trial, the Court held that it did not amount *in fact* to gross negligence. I take it the reason of that was, that the Court held, that under those particular circumstances, the question of fact of gross negligence was wrongly decided by the jury, and therefore they sent it back to another trial. I looked to see whether the *pleadings* were set out there; for I think it is not impossible that the *pleadings* were so framed that it was a question for the Court upon the decla-

ration itself. I do not know how that is; for the pleadings are not set out so as to enable me to judge.

Upon the general question, it appears to me, that this being a question for the *jury*, there could be no *consuit*.

The next point is, whether it was left properly; for I understood, when the motion was made, that one question was, whether my lord had left it to the jury as a case of gross negligence. Certainly the impression on my mind was, that it was intended to be stated that my lord had left it to the jury not as a question of gross negligence, but that his lordship had stated that the defendant would be liable, unless he had taken that *care* of the money which any *reasonable* man might be supposed to take of his own. Now, the *care* which a *reasonable* man might be supposed to take of his own, may be a very good *criterion* as to *gross* negligence, but they are not precisely the same things; and it was upon that point the rule was granted. But it now appears, upon the whole of this discussion, that my lord left it to the jury as a question of gross negligence; that he told the jury he did not himself see sufficient evidence to satisfy him that there was gross negligence, and that what he said with respect to taking *that care* which a man must *ordinarily* be supposed to take, was merely by way of *illustration*. I do not see that it was at all wrongly left to the jury; and as I think it was in this instance a question for the jury, I cannot say that we ought to disturb that verdict. Whether I should have come to the same conclusion, is a question upon which it is unnecessary to say a word.

WILLIAMS, J.—It is certainly a question of very considerable importance how far in this particular case, without travelling out of it, my lord ought to have stated *his* opinion that from the facts gross negligence was not made out, or was justified in leaving the question to the jury. There is no rule of law which requires a judge beforehand to estimate what is or is not gross negligence, and I apprehend that no man living would be able to lay down any rule whatever;

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because who can say where *negligence* ends and *gross negligence* begins? (a) That is a matter to be submitted as a question of fact for the consideration of the jury, and it seems to me clearly that it was properly so submitted. Reference has been made to the case of *Shiells v. Blackburne*, in which it does not appear in what way the question was left to the jury. I have before me two cases, which are cases of gross negligence. One is a case of an action against an attorney, where it is old and familiar doctrine that the action cannot be maintained but on the ground of *crassa negligentia*; *Reece v. Rigby* (b); in which, after the facts had been gone through, the lord chief justice left it to the jury to say, whether from those circumstances the defendant had used reasonable care and diligence in not previously ascertaining certain facts. So that in that case (which is a case of gross negligence) the learned judge did not take it from the jury and pronounce *his* opinion, but left the facts of the case for *their* consideration, in order to ascertain whether or not in *their* judgment gross negligence had been committed. In an earlier case, *Moore v. Mourgue* (c), which was an action by a merchant against his agent, for negligence in not insuring goods, tried before Lord Mansfield at Guildhall, a motion for a new trial having been made, his lordship reported that he had left it to the jury, with a direction that if *they* thought there was gross negligence, or that the defendant had acted *malâ fide*, they should find for the plaintiff. So that in this case also it clearly appears that it had not been taken by his lordship into his *own* hands, under any general notion that what is or is not gross negligence in law was a question to be decided by himself, but left as a question of fact for the consideration of the jury. He so reports; and with that direction of Lord Mansfield, as with that of Lord Tenterden, no fault was found. Therefore in those cases, which are expressly upon the point of *gross negligence*, the judges did not take

(a) And see Professor Story's notes to the American edition of Jones on Bailments.

(b) 4 Barn. & A. 202.

(c) Cowp. 479.

upon them to ascertain the point as a *question of law*, but left it as a *question of fact* for the consideration of the jury. It seems to me therefore to be perfectly clear that it is impossible, upon facts of this nature, for the judge to pronounce any rule of law, but that the question, whether the negligence proved is ordinary or gross, must of necessity be submitted to the jury.

The other question is one of far less importance, viz., whether or not, under the particular circumstances of the case, there was *evidence* of that description; and it appears to me that there certainly was. Whether there was *enough* to satisfy *my* mind or not, is another question. No man can lay down any rule upon that subject; some minds are satisfied with more, others with less evidence. Unquestionably there was *some* evidence. It appears that one part of the house was shut on a Sunday, the other part open, and frequented by people not of the best description. Can it be said that the fact of putting the money in the more exposed part of the premises, instead of in the more secret, unfrequented, and retired, part of the house, on that day, was not a circumstance to go to the jury as evidence of negligence? I cannot say what conclusion *I* should come to on this point; but was there not *evidence* for the jury? There were some points left in uncertainty; whether it was in a box *uncovered*, or whether it was in a box that was *locked*, or in what state it was, does not appear; but that is of infinitely less importance, for it seems to me there was *some* evidence which his lordship was *bound* to leave to the jury, and that he could not pronounce an opinion, in point of *law*, whether there was gross negligence or not.

Lord DENMAN, C. J.—I thought this a case in which negligence, on the part of the defendant, was *clearly* proved in the first instance—that is, some degree of negligence; and I thought, and still think, that it is utterly impossible for any judge to take upon himself to say whether that negligence is gross or otherwise. That must depend upon the

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knowledge of the jury upon all the facts of the case, and the circumstances under which the supposed negligence had been committed. I therefore felt myself bound to submit the case to the jury. I entirely accede to the law laid down in *Skiells v. Blackburne*; but it seems to me there is in that case no law laid down, except that a bailee, under the particular circumstances of that case, was not liable. There was not one word said to shew that the judge is to decide the question of gross negligence, or to prevent the jury from deciding the question on the facts proved before them. With regard to whether the negligence was really gross, I certainly did not take the same view at the trial that the jury did, and I pressed, as strongly as I could upon them, my view of the case, that it was *not* gross negligence, and certainly, at the moment they began to deliberate, I should not have agreed to their verdict; but whether, if I had heard all that *they* had to say, with the knowledge and experience which *they* might bring to bear upon the point, I should have been of that opinion, is another question. Probably I might have altered my opinion; but, at all events, that point was for the decision of the jury.

Rule discharged.

EDMUNDS v. HARRIS.

In an action of debt for goods sold and delivered, the defendant pleaded *nunquam indebted*:—Held, that he could not give in evidence, under this plea, that the goods were sold on credit which had not expired.

DEBT, for goods sold and delivered. Plea: that the defendant never was indebted in manner and form as in the declaration alleged. At the trial before the under-sheriff of Middlesex, the defendant proposed to shew that the goods had been sold upon *credit* which had not expired. The under-sheriff was of opinion that this evidence was inadmissible, and refused to receive it. A verdict was found for the plaintiff. In this term *Manset* obtained a rule nisi for a new trial, on improper rejection of evidence.

Busby now shewed cause. The defence attempted to be

set up was inadmissible. The rule (a) is this:—"In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that 'he never was indebted in manner and form as in the declaration alleged;' and such plea shall have the same operation as the plea of "non assumpsit" in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as directed in actions of assumpsit." On reference to the rule as to the plea of non assumpsit, in an action for goods sold and delivered, it appears that such a plea would operate as a denial of the sale and delivery only. It was said at the trial—True, the goods have been sold and delivered, but the period of credit has not expired. That defence however, under this issue, is of no avail; for the object of the new rules is, that every matter of confession and avoidance (b) should be specially pleaded. The issue joined only raises the question whether or no the goods were *in fact* sold and delivered. If the defence had been, payment at the time of the delivery, the defendant could not, under the plea of non assumpsit, have availed himself of it. Had a bill of exchange been given which had not become due, that must have been specially pleaded. If such evidence as this is admissible under this plea, all the evils will be let in which the new rules were intended to

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(a) H. T. 4 Will. 4, ante, iii. 8.

(b) The defence set up was not matter in *confession and avoidance*, but in *denial*. It was a denial of the sale modo et formâ,—a denial of such a sale as would give the plaintiff even a *prima facie* right of action. It was not true that the defendant ever was indebted within the meaning of the declaration. The defendant could not have pleaded in *confession* and avoidance without admitting all that was expressly or impliedly contained in the declaration,—without admitting that the goods were sold for money

payable before action brought. If the declaration had *shown* that the debt demanded was payable at a day not yet arrived, it would have been *error*. The difficulty in the present case seems to have arisen from the circumstance that the generality in *declaring*, introduced during the last century, remains, whilst generality in *pleading* is taken away. The effect of this will often be, as was perhaps the case here, to entitle a plaintiff to recover without having a cause of action.

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remedy. The object of those rules was, that the plaintiff should know the defence intended to be set up.

Mansel, in support of the rule. The object of the new rules is to lay down two principles; first, that the general issue denies that which is the right of action; secondly, that matters of confession and avoidance shall be specially set forth. The cause of action in the declaration must be proved in every material respect: if untruly stated, the variance may be given in evidence under the general issue. In the present case the declaration alleges that the defendant is indebted to the plaintiff for goods sold and delivered, to be paid for on request, and that thereby an action hath accrued. There was, however, no complete cause of action when the writ was sent out, because, though the goods were admitted to have been delivered, the evidence tendered on the part of the defendant went to shew that the time had not arrived for the payment of the price. A defence of payment would be different from this, because that admits a sale and delivery upon the terms of *immediate* payment.

LORD DENMAN, C. J.—The goods were sold and delivered, and those facts alone are denied by the plea. This is just the sort of case which these rules were intended to remedy.

TAUNTON, J.—I am of the same opinion. If the agreement was to pay at a future day, that matter should have been specially pleaded.

PATTESON, J., concurred.

Rule discharged (*a*).

(*a*) In the outer Court *Little-
dale*, J., had held the evidence ad-
missible; but he referred the parties to the full Court.

The KING v. GEORGE SHEPHERD.

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INDICTMENT against *Shepherd* as one of the high constables of the borough of Marlborough, in the county of Wilts, for disobeying an order of the justices at the quarter sessions for that county, commanding him to issue his warrant to the overseers of the several parishes in that borough to collect and levy 9*l.* 14*s.* for the purposes of the county rate for the said county. Plea: not guilty. At the trial before *Parke, J.*, at the Devonshire spring assizes, 1831, a verdict of guilty was taken by consent, subject to the opinion of the Court upon the following case; in which all the formal acts stated in the indictment are to be taken as found by the jury, the question being confined to the *power of the county justices.*

4 Jac. 2 (1688). Inspeximus and confirmation of charter of 18 Eliz., which confirmed the previous charters, and granted to the borough of Marlborough to be thenceforth a free borough incorporate by the name of "The Mayor and Burgesses of the Borough and Town of Marlborough, in the County of Wilts." "The Mayor, &c." to be a body politic and corporate by that name; to plead and be impleaded by that name; to have a common seal; to have power to purchase and receive lands, &c. The queen further granted to the mayor and burgesses, and their successors, *that they might have for ever a common gaol within the borough*, safely and securely there to keep, by the said mayor and burgesses or their deputies, all persons to be from time to time apprehended or taken within the same borough, and all other persons for any cause happening to be sent to the said prison or gaol, until they should be delivered therefrom according to form of law. And that it should be lawful to the same mayor and burgesses, at their pleasure, thenceforth, from time to time, to send prisoners who should happen to be apprehended *for treason, murder, felony, or suspicion of felony, within the said borough, to the common gaol of the county*

In a borough to which the king has granted by charter that the borough justices shall have exclusive jurisdiction in misdemeanors, without jurisdiction in felonies, and that the county justices shall not intrude themselves within the borough; and in which a borough-rate applicable to the purposes of a county-rate was levied before the passing of 55 Geo. 3, c. 51,—the county justices have no power to order the levying of a county-rate, although, by virtue of its charter, the borough brings burthens upon the county.

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of Wilts, commanding, and by the tenor of these presents firmly enjoining, the keeper of the same gaol for the time being, the same prisoners, and every of them, from time to time to receive, and safely and securely keep them there until they should be therefrom delivered according to form of law. And further, that the said mayor and burgesses should have, hold, receive, and enjoy, courts leet, law days, courts of pie-pouder, fines, amerciaments, views of frankpledge, waifs, estrays, &c., as they had previously held, received, and enjoyed, by charter or prescription. And further, that the mayor for the time being and two other burgesses of Marlborough, to be named by the mayor, or two of them (of whom the mayor to be one) should be justices of the queen, her heirs and successors, to keep the peace, and to do and execute all other things which to a justice of the peace in any of the counties of England pertain to be done and executed for the good keeping of the peace, and for the quiet rule and safe government of the queen's people, and to keep and cause to be kept all and singular their articles within the borough aforesaid, according to the force, form, and effect of the statutes and ordinances thereupon passed, and to punish all those who should be found acting or offending against the force and effect of the statutes and ordinances aforesaid, according to the law and custom of the kingdom of England, as fully and entirely, and in as ample manner and form as justices of the peace in the county of Wilts or elsewhere within the kingdom of England had theretofore done or exercised, or should thereafter do or exercise, out of the borough and liberties aforesaid; so, nevertheless, that the said justices of the peace within the borough and town of Marlborough for the time being did not proceed to the determination of any FELONY, without the special mandate of the queen, her heirs and successors. And further, that the mayor should be escheator and coroner, and clerk of the market within the said borough, and that he might do and execute all things which to those offices belong within the borough. And that

no other justice, escheator, coroner, or clerk of the market of the queen, her heirs and successors, into the said borough, or the precincts of the same, should in anywise enter or intrude themselves or himself there to do and execute any thing there which to the office of justice, escheator, or clerk of the market pertains, there to be done and performed.

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The mayor and burgeses act as justices within the borough. The county magistrates exercise no jurisdiction within the borough. The practice is, and always has been, to cause the warrants of the county magistrates to be backed by the borough justices. They hold quarter sessions. There is a borough gaol. Prisoners are occasionally placed there previously to examination. A surgeon is paid for attending the poor for casualties, and for attending on the prisoners. The expense of keeping up this place is borne by the borough. Prisoners who are to be tried at the borough sessions, or are to remain in custody, are sent to a county prison, situate within the borough, but which is the Bridewell of the county of Wilts. The expense of maintaining them there is paid by the borough. The gaoler of the Bridewell, who is appointed by the county justices, receives distinct salaries from the borough and from the county. Persons charged with felonies committed within the borough are generally sent to the county Bridewell within the borough, for trial at the county assizes; but when the offences charged are heavy, the prisoners are sent at once to the county gaol at Fisherton, near Salisbury, for trial at the assizes. The borough bears the expense of conveying them thither, but the expense of maintaining them there and of conveying them thence to the assizes, is borne by the county.

The borough pays the expense of passing vagrants through the borough. The mayor acts as coroner within the borough. The expenses of inquests are borne by the borough.

A rate is generally made once a year upon the two parishes within the borough. None has been found earlier

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than the year 1775. That rate, which was put in on behalf of the defendant, purported to be a rate made under the 12 Geo. 2, c. 29, and 13 Geo. 2, c. 18, respecting county rates, and to be made for the purposes mentioned in those acts (a).

Similar rates have been constantly made and paid since the making of the above. The expenses and charges before mentioned as being paid and borne by the borough, together with other expenses, are borne out of the funds produced by these rates.

An order on the borough made by the county justices in the year 1819, for payment of a sum towards the county rate, was appealed against and quashed. No county rate was at any other time charged on the borough until that out of which the indictment arises.

An order made by the Court at the delivery of the gaol for the county of Wilts, held at New Sarum in 1825, was put in for the defendant. The Court ordered, at the prayer of *U. W. L.* (the prosecutor of *C. H.*, tried and convicted before that Court of felony), that the churchwardens, &c. of the parishes in the borough of Marlborough, in the said county, in which the offence was committed, should forthwith pay to the prosecutor 10*l.* 16*s.* for expenses, trouble, and loss of time therein. Whether any payment was made under this order did not appear. The prosecutor having applied for his expenses of that prosecution to be paid out of the county rate, the application was resisted on the part of the county justices. And it appearing that the felony had been committed within the borough of Marlborough, which did not contribute to the county rate, the judge made no order on the county.

The corporation of Marlborough furnish their own town hall, in which the business of the county quarter sessions as well as their own has always been conducted.

The question for the opinion of the Court is, whether the county justices had power to make the rate mentioned

(a) See the effect of the two statutes stated in argument, *post*, page 191.

in the indictment. If the county justices had no such power, the verdict is to be set aside, and a verdict entered for the defendant.

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Barstow, for the Crown. This borough brings charges upon the county, and therefore ought to contribute proportionably to the county rate. The county rate is levied for a great variety of purposes, and it is admitted that the borough ought not to be rated to the county rate in respect of those purposes for which it raises within itself a rate in the nature of the county rate; but it ought to be rated by the county justices to the extent of the burthens which it brings upon the county. The words of 55 Geo. 3, c. 51, sec. 1 (a), are large enough and strong enough to give jurisdiction to the justices of Wiltshire over the borough of Marlborough. In the *Bath case* (b), decided in 1823, it was held that where the liberty or franchise has "*a separate jurisdiction co-extensive with that possessed by the county justices*," it is not within the limits of the jurisdiction of the county justices; but that it is otherwise where the jurisdiction of the franchise is *not co-extensive* with that of the county justices. The city of Bath was held not to be

(a) By which it was enacted, that the justices of the peace for the several counties in England, assembled at their general quarter sessions, might, and they were thereby authorized and empowered, whenever circumstances should appear to require it, to order and direct a fair and equal county rate to be made for all the purposes for which the county stock or rate was then or should thereafter be made liable by law; and for that purpose to assess and tax every parish, township, or other place within the respective limits of their commissions, rateably and equally. *Provided that nothing in*

that act contained should extend, or be construed to extend, to give any jurisdiction to the justices of the peace of the said several counties over any place situate within the limits of any liberties or franchises having a separate jurisdiction,—which before the passing of that act were subject to rates in the nature of county rates, imposed and assessed by the justices of the peace for such liberties or franchises,—or which were exempt from the rates of the county in which they lie, either in the whole or in part.

(b) *Res v. Clark*, 1 Dowl. & Ryl. 316; 5 Barnw. & Alders. 665.

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exempt from the jurisdiction of the county justices, and the Bath charter, upon which that case depended, so nearly resembles, in all material parts, that of Marlborough, that the decision in *that* case must form an unanswerable authority in *this*. The jurisdiction of the borough justices in this case is not co-extensive with that of the county justices as regards felonies. The charter of Queen Elizabeth gives to them power to do and execute all things which to a justice of a county pertain to be done; "so, nevertheless, that the said justices of the peace within the borough and town of Marlborough do not proceed to the determination of any felony without the special mandate of the king." The facts stated in the *Bath case* and the present are in all material respects the same. A distinction will perhaps be taken, on the ground—that in Marlborough, rates in the nature of county rates had been made for a considerable time under 13 Geo. 2; whereas in Bath none such had been made;—but this distinction is met by the admission that in a franchise having a separate jurisdiction to a limited extent, the justices may make a local rate for the purpose of defraying such expenses, in the nature of county burthens, as are borne by themselves, without ousting the county justices of their jurisdiction under 55 Geo. 3, c. 51, s. 1. The *Maidstone case* (a), which is the converse of the *Bath case*, is not opposed to this argument. If the county justices should rate the borough in respect of burthens which the borough does not contribute to throw on the county, the borough may appeal, and have the rate reduced proportionably.

Follett for the defendant. Marlborough is within the proviso in the 55th Geo. 3, c. 51, s. 1. The *Maidstone case*, though the converse of the present case, is a decisive authority. By the Marlborough charter, the borough justices are in express terms empowered to do all things

(a) *Mercer v. Davis*, 10 Barnw. & Cresw. 617.

which to county justices pertain to do and execute, and the proviso that they shall not proceed to the determination of any *felony*, is not material; for, it is apprehended, jurisdiction over felonies is not *incident* to the office of justice of the peace. In the *Maidstone case*, the justices were only authorized to hear and determine all trespasses and misdemeanors arising within the town and parish, as justices of the peace for the county might have done, and they were expressly forbidden to determine treason or felony without special mandate from the king. Yet the Court held, that to the *local* justices belonged the power of making rates in the nature of county rates under 13 Geo. 2, c. 18. The decision proceeded principally upon the *ne intromittant* clause, "that no justice of the county of Kent should in anywise intermeddle within the town and parish of Maidstone, to do any thing which there belongeth and appertaineth to the office of a justice of the peace;" and there is a clause to precisely the same effect in the Marlborough charter. That case, though the converse of the present case, is a clear authority in favour of the defendant. It is material in this case to look at the facts which are here stated. The justices of Wilts do not exercise, and never have exercised any jurisdiction within the borough. Their writs are backed by the borough justices. If a felony is committed within the borough, the borough justices commit, and the prisoner is tried at *the assizes*; so that the county magistrates exercise no jurisdiction whatever either by commitment or trial. The borough has a gaol, a bridge, &c., and pays for them. By 12 Geo. 2, c. 29, a general power was given to county justices to levy a county rate, but they had no jurisdiction over liberties and franchises having commissions within themselves and not subject to the county justices, and which had not before that time contributed to the county rate. By 13 Geo. 2, c. 18, s. 7, the justices of such liberties and franchises are empowered to exercise the same powers as to rates as justices in their counties. Under

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this latter act, the justices of Marlborough have, since 1775, if not from an earlier time, made rates similar to those made, by the county justices, upon the county; and such rates have been levied; no rate made by the *county* justices has been levied within the borough. Marlborough falls, therefore, most precisely within the proviso in 55th Geo. 3, c. 51, for it is a "place situate within the limits of a liberty or franchise having a separate jurisdiction,"—"which before the passing of that act was subject to rates in the nature of county rates, imposed and assessed by the justices of the peace of such liberty or franchise"—"or was exempt from the rates of the county in which it lies either in the whole or in part." In *Rex v. Clarke* (the *Bath case*), the facts were not the same, and some of the dicta of the judges (which were obiter dicta) are perhaps not strictly good law; as appears to have been the inclination of the Court, and especially of *Bayley, J.*, in the *Maidstone case*. But the facts of that case are sufficient to distinguish it. The county justices were not by the charter deprived of jurisdiction over offences committed in the city of Bath, but that jurisdiction is preserved *in case of default* by the city justices. The justices of Somerset tried felonies committed in the city at their *sessions*. Here, they are tried at the *assizes* only. No local rate in the nature of a county rate appears to have been made in the city, as here. It is true that the borough justices in this case have power to commit to the county gaol, but that is by express charter; and it is true that felons, when there, are maintained by the county; but the question is not whether the borough *throws an expense* upon the county, but whether in point of law the county justices have *power* to levy a rate upon the borough. The county justices have *no power* to do so; therefore the order, for disobedience to which this indictment is preferred, is an *illegal* order, and consequently the indictment cannot be supported.

Barstow, in reply. This borough undoubtedly has its

rate in the nature of a county rate, but only for *partial* purposes. *Rex v. Clarke* is precisely in point. It is not contended that *because* the borough brings a burthen upon the county, therefore they must be liable to the county rate; but when the question arises upon a statute passed for the purpose of enabling county justices to make a fair and equal county rate for all the purposes for which the county stock or rate is liable, it is a fair construction that a particular part of the county which brings a particular burthen upon it, should be liable to be rated proportionably. The *Maidstone case* only goes to shew, that a place circumstanced as Marlborough may have a county rate itself for some purposes, and does not shew that it may not for other purposes be rated to the county.

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Cur. adv. vult.

Lord DENMAN, C. J., in the course of the term, delivered the judgment of the Court as follows.—The question is, whether the justices of the peace of Wilts have a right to enforce a county rate in the borough of Marlborough,—the charter of which gives the borough justices power to commit felons to the county gaol, but prohibits them from trying felonies; at the same time containing a ne-intromittant clause. The only facts in the case applicable to this question are, that the borough justices act within the borough, and that the county justices exercise no jurisdiction there; that the borough justices have, since 1775, levied rates in the nature of county rates, and that the county has never rated the borough; that the borough has a gaol of its own, and that a county gaol is also locally situate within the borough; that the prisoners apprehended for felonies committed within the borough have been apprehended by warrants of the county justices backed by the borough justices; that the expenses of conveying them for trial from Marlborough to Fisherton gaol for the assizes have been paid by the borough, but the expenses of main-

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taining them in the gaol, and of conveying them from that gaol to the assizes, by the county.

Under these circumstances, we think that there must be judgment for the defendant. There is some confusion in the cases on the subject, which appear at first sight not easy to be reconciled: but as our opinion is founded on the words in the proviso of 55 Geo. 3, c. 51, s. 1, and the 24th section of the same statute, we think it not necessary to discuss the decisions.

The proviso, after authorizing the justices of the peace of the several counties in England, at their sessions, to make a fair and equal county rate, goes on and says, "provided that" [here his lordship read the proviso]. With this the 24th section, authorizing rates for counties, towns, and other places having commissions of the peace within themselves, agrees. By that section, "where any ridings or divisions have separate commissions of the peace, or where any cities, towns, or other places in England have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissioners of the peace for the counties at large in which such liberties and franchises lie, and do not, nor did before the passing of this act, contribute or pay to the several rates made for the said counties at large, it shall be lawful to and for the justices of the peace of such separate jurisdictions within the respective limits of their commissions to have, use, and exercise all and singular the powers, authorities, and methods given or prescribed by this act, and all such separate jurisdictions are hereby declared to be subject thereto, in the same manner, to all intents and purposes, as counties at large, any law, usage, or custom to the contrary notwithstanding." It is, we think, sufficient to say that the case is within the proviso. Marlborough is a place having a separate jurisdiction, and it was, before the passing of the act, subject to rates in the nature of county rates imposed and assessed by its own justices. Both conditions, therefore, are satisfied. We are aware that

this construction is not consistent with some of the dicta to be found in the cases cited, or rather, with the expressions used by Lord *Tenterden* in *Rex v. Clarke*, that the jurisdiction of the borough magistrates must be *co-extensive* with that of the county magistrates, and with what Mr. Justice *Bayley* states in the beginning of his judgment in the same case. But this case, owing to the mixed and incongruous circumstances of which it is composed, does not admit of a decision without conflicting with some previous opinion. The safest course is to abide by the words of the statute.

Judgment for the defendant.

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ASSUMPSIT on the warranty of a horse. Plea, the general issue. At the trial before *Taunton, J.* at the sittings in Easter term last, it appeared that a horse had been sold by the defendant to the plaintiff with a warranty of soundness. The price paid was 40*l.* The sale took place on the 26th of June. On the 9th of July the horse was discovered to be lame. On the 25th of July the horse was taken to *Osborne's* livery-stable, and notice was given to the defendant that the horse was placed there, and might be taken away by the defendant, if he pleased. On the 27th of July, the present action was commenced. On the 6th of September the defendant was informed that it was intended to sell the horse; and on the 16th of September the horse was sold for 24*l.* 3*s.* The expenses of the sale being 2*l.* 17*s.*, the sum received upon the sale was 21*l.* 6*s.* The expense of the keep from July to September was 9*l.* 16*s.* The action was brought to recover 28*l.* 10*s.*,

Where a horse, warranted sound, turns out to be unsound, and is, after notice to the seller, re-sold by the purchaser, the latter may recover not only the difference of price between the first and second sales, but also the keep of the horse for a reasonable time.

But the question whether the horse has been kept an unreasonable time before the re-

sale, is a question for the jury; and if the seller rests his defence on the soundness of the horse, and does not request the judge to leave the question of time to the jury, the Court will not, upon motion for new trial, look into the evidence upon this point.

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being the difference between the price originally paid for the horse and the price of the second sale, with the amount paid for the keep. The defence set up was, that the horse was sound. When the amount of the keep was offered to be proved, the defendant objected that it was not recoverable. This objection was over-ruled. The horse was proved to be lame during the whole of the period it was at the livery-stable. The learned judge left it to the jury to say, whether they were of opinion that the horse was unsound at the time of sale; and told them, that if he was so, the defendant was liable; and that the costs of the keep of the horse, after the notice of the unsoundness and whilst the horse was at the livery-stable, were recoverable, as well as the difference of price. The jury found a verdict for the plaintiff, damages 28*l.* 10*s.* *Platt* in Easter term obtained a rule nisi for a new trial, or to reduce the verdict by the amount of the expenses of the attendance on and keep of the horse.

Byles now shewed cause. If the rule was obtained on the ground that the plaintiff had no right to retain the horse for so long a period, as elapsed in this case, between the notice and the second sale,—it cannot be made absolute, because the question, whether the horse was kept for an unreasonable length of time, was for the jury, and the learned judge was not desired by the defendant's counsel to take the opinion of the jury upon that question. In *M^r Kenzie v. Hancock* (a), it was determined that where the defendant had refused to take the horse back again, the plaintiff was entitled to recover for the keep, for so long as it was requisite to keep the horse in order to sell him to the best advantage. Cases may be readily supposed in which, for that purpose, it may be necessary to keep the horse for a considerable period. There is, however, evidence in this case, that the horse was not kept for an unreasonable length of time.

(a) *Ryan & Moody*, 436.

Platt contra. The rule of law is, that the measure of damage which the plaintiff, in an action like this, is entitled to recover, is the difference between the price given and that for which he was sold, *Caswell v. Coare* (a). The plaintiff is not entitled to the keep of the horse. The horse was kept for an unreasonable length of time. [Lord Denman, C. J. You ought to have taken the opinion of the jury on that question.] It was rather the duty of the judge to submit that question to the jury. If the defendant had insisted upon the trial that the plaintiff was not entitled to the price of the keep for so long a time as the horse was kept in this case, the jury might have construed that into an admission that the horse was unsound. It is dangerous to put a defence upon two grounds, lest the one may be construed into an abandonment of the other.

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LORD DENMAN, C. J.—I think a party who returns a horse for unsoundness is entitled to charge for his keep after a refusal to take him back; I can conceive no case in which a horse is returned where the buyer is not entitled to charge for *some* keep. If the question is, whether the charge for the keep is *reasonable*, that is a question which the defendant ought to submit to the jury. In this case the defendant denied his liability altogether. No doubt some disadvantage may arise in conducting a case, in putting it upon two different grounds; but that cannot at all vary the course which ought to be pursued at the trial. It is for the counsel who says that the demand for keep is *unreasonable*, to shew to what extent it is so, and to take the opinion of the jury upon the subject. If he rests his defence upon another ground it seems to me to be very reasonable to suppose that the charge for keep was taken to be quite uncontested.

PATTESON, J.—The counsel for the defendant should have either put the question to the jury himself, or when

(a) 1 Taunt. 566; 2 Campb. 82.

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the learned judge came to the question of damages, he should have desired him to put it to the jury to determine the reasonableness of the time for which the horse was kept.

WILLIAMS, J.—I think it is by no means an unreasonable amount of damages; and, all things considered, I think the defendant got remarkably well off. If there were another trial, I think it highly probable the damages would be larger. The defendant had distinct notice that the horse was at the livery stables, and, if he had pleased, he might have taken it away at any moment, and then the cause of action would have been removed altogether.

TAUNTON, J. concurred.

Rule discharged.



The KING v. REDFERN.

A prosecutor is entitled to a *certificate* from the Crown Office of an indictment having been found, upon payment of the customary fee for the *certificate*, without paying for a copy of the indictment also.

IN this term *Jones* obtained a rule calling upon the Solicitor of his Majesty's Treasury and *Mr. Belt*, one of the clerks in Court in the Crown Office, to shew cause why *Mr. Belt* should not deliver to the prosecutor, or to his attorney or agent, a certificate of this indictment having been found by the grand jury in this Court, on payment of the usual fees for the *certificate* only. The grand jury of Middlesex, on the 10th of November, found a true bill for perjury against the defendant. The prosecutor, wishing to issue a warrant to apprehend the defendant, applied to *Mr. Belt* at the Crown Office, for a certificate of the indictment having been found, upon payment of the usual fee for such certificate only. The practice in the Crown Office being to furnish a copy of the indictment together with the certificate, and to charge fees in respect of each, *Mr. Belt* refused to give the certificate except upon payment by the

prosecutor of the fees for the copy of the indictment, (which he was ready to furnish,) as well as those for the certificate itself.

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Campbell, A. G. now shewed cause. It has been the immemorial custom, that a copy of the indictment as well as the certificate should be paid for. The indictment and the certificate may be considered as one instrument. It is necessary that the judge should have a copy of the indictment in order that he may be able to determine what amount of bail should be required.

Jones in support of the rule. The practice in the Crown Office is unjust, and ought not to continue. The reason which is assigned fails, as it is not now necessary to produce a copy of the indictment to the judge.

Lord DENMAN, C. J., after consulting with the officers of the Crown Office, said:—The course of office appears to be for the prosecutor to take out a copy of the indictment, though when the parties come before a judge he has only an *abstract* of the indictment. There is, therefore, no use whatever in having a *copy* of the indictment. The prosecutor in all cases has a copy of the indictment which he has himself preferred, and the judge can hold the party to bail upon the *certificate* alone. The reason suggested for furnishing the copy of the indictment,—that otherwise the learned judge would not know what bail to require,—is good; but it appears that the judge has only an *abstract* of the indictment, and not a *copy*, when the parties are bailed. I do not, therefore, see why the present practice should continue.

The other Judges concurring,

Rule absolute.



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SEARLE v. BARRETT.

A tender before action brought is not pleadable to an action for unliquidated damages.

In an action by landlord against tenant for not repairing, the Court refused to allow the defendant to pay money into Court by way of compensation and amends under 3 & 4 W. 4, c. 42, s. 21, under the plea given by Reg. 17 H. T. 4 W. 4, and under a plea of tender before action brought.

ASSUMPSIT by landlord against tenant, for a breach of a contract to keep in repair, to paint the outside, and leave fixtures in as good plight as they were in at the making of the contract. The defendant had, before action brought, tendered 5*l.*, and this sum had been refused. *G. T. White*, in this term, moved, before *Littledale*, J. in the Outer Court, for leave to pay the sum into Court by way of compensation and amends under 3 & 4 *Will.* 4, cap. 42, s. 21, and that the same sum might be received into Court under a plea in the form given by the 17th Rule of Hilary Term, 4 *Will.* 4, and under a plea of tender before action brought. That learned judge was of opinion that a tender was not pleadable in an action of this nature, in which the damages sought to be recovered are unliquidated; but he gave leave to move in the full Court.

White now moved accordingly. In *Johnson v. Lancaster* (a), it was settled, on demurrer, that a tender is pleadable to a count upon the *quantum meruit*. This decision is recognized by Mr. Serjt. *Williams*, in a note to *Birks v. Trippett* (b), where he says, "Lord *Holt* is said to have been of opinion, that a tender would not be pleaded to a count upon a quantum meruit, 1 Lord Raym. 255 (c). But the contrary has been since settled upon demurrer, 1 Str. 576, *Johnson v. Lancaster*." An action upon a quantum meruit is, in fact, an action for *unliquidated* damages. In such an action, as in *this* case, the amount of the damages would depend upon the evidence of value to be given by the witnesses. Take the case of a quantum meruit upon a tailor's bill; can it be said (with reference to

(a) 1 Stra. 576.

(b) 1 Wms. Saund. 33 (b).

(c) *Giles v. Hartis*—"Per *Holt*, C. J., a man cannot plead a ten-

der and tout temps prist in a *quantum meruit*, because the demand is entirely uncertain."

the point now under discussion), that any distinction exists in principle between that case and an action for breach of contract by a landlord against his tenant. The same principle would support a plea of tender in one case as well as in the other. [*Patteson*, J. The plea of tender does not apply to a case like this. If it does, you need not apply here. Your application is for leave to pay in a sum of money upon a bad plea of tender; for such I think it quite clear that the plea would be.] It is hoped that the Court will not now decide finally upon the point, and that an opportunity may be afforded of bringing the question before them upon demurrer. If this application is granted, a judge at chambers will be applied to for leave to plead the two pleas proposed. [*Patteson*, J. I do not think that any judge will give you leave to do so.]

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LORD DENMAN, C. J.—Lord *Holt* appears, from the case which has been referred to (*a*), to have doubted whether a tender was pleadable to a count upon a *quantum meruit*; and perhaps his impression was the correct one. Certainly, however, the plea is not good in the case of an action for unliquidated damages (*b*).

PATTESON, J. (*c*)—If you want to plead a tender, you can of course do so; but I have not the least doubt but that the plea would be bad.

Rule refused.

(*a*) *Ante*, 200 (*c*).

(*b*) So, a plea of *set-off* to such a declaration, vide *Auber v. Lewis*, *Mass. Dig.* 2 ed. 251, which was an action by the assignor of a lease against the assignee, upon a covenant to pay the rent, and to

indemnify the assignor against the non-payment.

And see *Hardcastle v. Netherwood*, 5 Barn. & Alders. 93.

(*c*) *Taunton and Williams*, Js. had left the Court.

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The KING v. The Inhabitants of the Parish of St. MARTIN, in LEICESTER.

To prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house, at 11*l.* per annum.

The witness stated that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, on purpose to bind her husband, the husband not being present; but that the entry was not signed by the witness or his father, nor did their name appear in any part. He further stated, that he had no memory of these things but from the book,

without which he should not of his own knowledge be able to speak to the fact; but on reading the entry, he had no doubt that the fact really happened. Held, that the entry was neither a lease nor an agreement for a lease within the stamp act.

Held also, that the witness might look at the entry to refresh his memory, and that the evidence which he gave was parol evidence of a letting.

Semble, that a receipt "for a quarter's rent due from A.," (the occupier,) is of itself evidence from which a letting may be inferred.

An "agreement, minute, or memorandum of agreement," is liable to be stamped, only where the instrument is *per se* binding on the parties to it, *per Patteson, J.*

UPON an appeal, an order of justices, whereby *Elizabeth Simpson* and her seven children were removed from St. Margaret's, to St. Martin's, Leicester, was confirmed, subject to the following case:—

Thomas Simpson, the husband of *Elizabeth*, occupied a house at 11*l.* per annum, in St. Martin's, from Lady-day, 1820, to Midsummer, 1821, under Sir *W. Walker*. Five receipts, each for a quarter's rent of 2*l.* 15*s.*, and respectively dated 26th July, 1820; 17th October, 1820; 20th January, 1821; 11th April, 1821; and 5th July, 1821; the first under the hand of his daughter, and the four last under the hand of Sir *W. W.*, were proved. To prove the taking, Mr. *W. W.*, son of Sir *W. W.*, was called, who produced a book containing the following entry made by the witness, viz. "March 24th, 1820—Agreed with *Thomas Simpson*, to have the house in Peacock-lane now occupied by *William*, at eleven pounds per annum, to be paid quarterly: quarter's notice to be given on either side; to leave in same repair as he found it." The witness further stated, that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent the possibility of mistake, and signed by the wife of *Thomas Simpson* (who was absent) on purpose to bind him; but that the entry was not signed by the witness nor by Sir *W. W.*, nor did the name of *Walker* appear in any part. He further stated, that he had no memory of these things but from the book, without which

he should not of his own knowledge be able to speak to the fact; but on reading the entry, he had no doubt that the fact really happened.

Held, that the entry was neither a lease nor an agreement for a lease within the stamp act.

Held also, that the witness might look at the entry to refresh his memory, and that the evidence which he gave was parol evidence of a letting.

Semble, that a receipt "for a quarter's rent due from A.," (the occupier,) is of itself evidence from which a letting may be inferred.

An "agreement, minute, or memorandum of agreement," is liable to be stamped, only where the instrument is *per se* binding on the parties to it, *per Patteson, J.*

the fact; but that on reading the entry, he had no doubt that the fact really happened. It was objected by the appellant's counsel, that the entry was inadmissible for want of a stamp, and that parol evidence of the letting could not be given. The Court held that the witness might look at the entry *to refresh his memory*, and might give parol evidence of the letting, and upon such evidence they confirmed the order.

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Hildyard (with whom was *Miller*), in support of the order of sessions, was stopped by the Court.

Humfrey, Follett, and White, *contra*. The sessions could not receive evidence of the taking; for the agreement to take having been reduced to writing, the written instrument, (though not admissible for want of a stamp,) was the best evidence of the taking. The witness who produced the book stated that he had *no* recollection of the letting except from reading the entry. The writing was not used merely *to refresh the memory* of the witness. The house was actually let *by* this agreement. In *Hodges v. Drakeford(a)*, it was admitted by the witness that an agreement had been made, (which agreement, being unstamped, was not produced,) and the witness was prevented from giving any further account. *Rex v. St. Paul's, Bedford(b)*. [*Taunton, J.* As the memorandum was in the witness's hand-writing, why might he not look at it?] Because it was a *contract* in writing. It was a *lease*. There are words of present demise; and possession, it appears, immediately followed. [*Taunton, J.* The entry was not signed by *Walker* the father or son.] It is written by *Walker*, the son, and signed by *Mrs. Simpson*. It is not necessary that a lease should be signed by *both* parties; the acceptance of it by the lessee is sufficient; *Payne v. Ives(c)*. Every lease, even though the rent reserved be under 20*l.*, requires a stamp.

(a) 1 N. R. 270.

(c) 3 Dowl. & Ryl. 664.

(b) 6 T. R. 452.

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It was argued at the sessions that this was an *agreement* for a lease, and not a lease. The Court has always taken the intention of the parties as the rule of construction. In *Doe v. Ries* (a), it was said by *Tindal*, C. J., "Upon the general and leading principle in such cases, we are to look at the words of the instrument and at the acts of the parties, to ascertain what their intention was." If there be a doubt whether this is an agreement or a lease, the Court will construe it as the latter. [*Denman*, C. J. This could not bind *Mrs. Simpson*, as she was a married woman.] She was the *agent* (b) of her husband. [*Taunton*, J. Ought not the sessions to have *found* that fact?] It is found that the husband entered upon the land and paid the rent,—which is equivalent. [*Lord Denman*, C. J. The *letting* was by parol, and this was a mere *memorandum* of it.] The witness stated that the *contract* was reduced into writing. The sessions went on the ground that there was no written contract. The witness was called to prove a parol letting, and he failed to do so. He stated that the terms of the letting had been reduced to writing, and that he had no recollection of the transaction except from reading the memorandum in the book. Unless the witness could give some evidence apart from the book, his evidence was inadmissible. [*Taunton*, J. Suppose a witness is called to prove the execution of a deed, and, upon seeing his name as an attesting witness, says that from that circumstance he recollects that the deed was executed. Is not that evidence?] In that case the witness is speaking of a fact independent of the written paper. Suppose a long conveyance to be put into the hands of a witness who has *no* recollection of its contents; and he, upon looking at the conveyance, states the consideration and the uses; then the written instrument would be the evidence. [*Taunton*, J. The case states that the witness *let* the house as the agent of his

(a) 8 Bingh. 181; 4 Moore & Payne, 438.

(b) *Vide Plimmer v. Selts, ante*, iii. 422.

father.] It also states that the *contract* was reduced to *writing*. In *Doe v. Perkins* (a) it was held, that although a party might refresh his memory from an instrument in writing, yet if he had no recollection of the matter except from reading the paper, his evidence was inadmissible. [*Patteson, J.* In that case the witness attempted to refresh his memory from *extracts* made by himself. It was said that the book itself must be produced. Suppose a witness is asked if he recollects a conversation, and he says that he does not, but produces a memorandum made at the time, and states the conversation; is that evidence admissible?] In that case the witness does not speak to the contents of a written instrument.

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Lord DENMAN, C. J.—If this was either a lease or an agreement for a lease, the sessions have done wrong; but I think it was neither. It was, in my opinion, a mere memorandum of agreement, to prevent mistake. It is said to have been signed by the pauper *on purpose to bind her husband*, but it does not appear that she had any *authority* to bind her husband as to this particular, or that he ever knew of the transaction, or recognised her act.

Then the question is, whether the appellants were at liberty to prove, in the way they have done, the letting by parol? The witness who stated the fact of the letting said, in effect,—I must look at this book; without looking at it, I have no memory on the subject; but upon looking at it, I have no doubt that the fact really happened. The sessions then say that he is not at liberty to look at the book for any other purpose than to refresh his memory; but that for such purpose, he *is* at liberty to look at it, and may give parol evidence of the letting, if his memory serves him. It appears to me that the sessions acted quite right, and that we must infer from the facts stated, that though the witness denied his recollection of the facts until

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his memory was assisted by the book, yet that by reading the entry, his memory of the facts is brought back. I think, therefore, that there is no ground for questioning that which the sessions have done.

TAUNTON, J.—I also am of the same opinion. Besides which it appears to me, although it has not been argued on that ground at the bar, there was some other evidence of a letting for 11*l.* by the year, besides that upon which the argument has turned to-day. It appears that five receipts, for five quarters' rent each (being 2*l.* 15*s.*), were put in. Those receipts afford the Court pretty distinct proof that there was a taking by the year, and at a rent of more than 10*l.* However, I do not put it entirely upon that ground, because I think this entry in the book was neither to be considered a lease, nor an agreement for a lease. It is a mere memorandum put into this book for the convenience of the party who made the entry.

PATTESON, J.—I am entirely of the same opinion. I look upon this entry as a mere memorandum. The schedule to the stamp act (*a*) makes any "agreement, or minute, or memorandum of an agreement" liable to be stamped when "*under hand only*;" by which it is meant to confine the operation of that part of the act to agreements which *per se* are binding on the parties. Now this instrument was not *per se* binding upon the parties. It is said that they *acted upon it*; but the question is, not whether the parties *acted upon it* or not, but whether, the instrument itself being examined, it proves to be a *binding instrument*, which could have been put in force if either party had refused to act upon it. It is clear that there was no signature by the owner, who was supposed to have let, and there was nothing that he could be sued upon if he had refused to let the party into possession; nor could he, by

(a) 35 Geo. 3, c. 184.

an action on the agreement, have compelled the party to pay rent if he had not entered, because the wife had no authority to bind the husband. If she had such authority, the sessions ought to have found the fact. There is **nothing**, therefore, on the face of the document which made it a lease or an agreement, and it is not a memorandum of agreement. Should the sessions then have put it into the hands of the witness, to refresh his memory? *Doe v. Perkins* has been cited, and has been pushed a great way further than the facts of the case warrant. In that case a party endeavoured to refresh his memory by *extracts from a book*, and the Court said,—You cannot refresh your memory by extracts from a book, though you may do so by a document in your hand-writing made at the time; you must produce the original book, that the other side may look at it, and cross-examine upon it, if they think fit; not that the book may be produced in evidence, but that the witness in all cases who professes to refresh his memory by a document, may have the original document there to offer to the other side for cross-examination. There is not a single point more in the case. The decision of the Court is in a very few words, and only goes to that effect. There is a case, decided before *Doe v. Perkins*, where a person produced a piece of paper which he said was copied from part of a book containing an entry of goods sold and delivered; and the Court said, you cannot refresh your memory by that paper—the book ought to be produced. It was never supposed that a witness, by referring to a book, would make that book evidence, but he may refresh his memory by it, and let the other side have the document produced, that they may cross-examine upon it.

WILLIAMS, J.—I am of the same opinion. I think this was neither a lease nor an agreement for a lease. It appears to me perfectly clear that the witness, on seeing the document, proved a letting by parol evidence; that is

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to say, upon refreshing his memory by the memorandum, he gave an account of that which was equivalent to a letting; and therefore I think the sessions were perfectly right.

Order of Sessions affirmed.

M'ARTHUR v. CAMPBELL.

Matter of objection not apparent upon the face of an award,—as an omission to adjudicate upon a matter or dispute brought before the arbitrator, —cannot be shewn for cause against a rule nisi for an attachment for non-performance of the award.

ASSUMPSIT. Plea: the general issue. This cause, and all matters in difference between the parties, were in June 1832, (by an order of Lord *Tenterden*, subsequently made a rule of court,) referred to arbitration; the costs of the suit and of the reference to abide the event. Before the arbitrator, the plaintiff sought to recover about 8*l.* for goods sold, and the defendant claimed a set-off (which had not been pleaded,) to the amount of 20*l.* Evidence was given in support of both these cross claims. The arbitrator awarded that there was *not any sum of money due and owing from the defendant to the plaintiff*, and that the defendant did not undertake and promise in manner and form &c. The costs of the suit and of the reference have been taxed at 10*l.* 10*s.*, which the plaintiff has refused to pay.

In last Easter term, a rule calling upon the plaintiff to shew cause why an attachment against him, for his contempt in not paying the sum of 10*l.* 10*s.* pursuant to the rule of Court, the award, and the master's allocatur, was obtained by *Miller*; against which,

Follett and *W. H. Watson* shewed cause. One of the matters in difference between the parties has not been adjudicated upon by the arbitrator; for a set-off was claimed by the defendant, and the arbitrator has only awarded that the defendant does not owe the sum of money which the plaintiff claimed. If the finding had been for the plaintiff, that certainly would have been a disallowance of the set-off; but it

is quite consistent with the award, as it now stands, that the plaintiff may still owe the defendant 12*l.*, being the excess of the set-off claimed, over the debt. An attachment cannot be demanded as matter of *right*. The power of the Court as to granting it is purely discretionary. Under the peculiar circumstances under which the Court on a former occasion discharged the rule for setting aside this award (a), it is hoped that they will now in their discretion refuse to enforce the award by the summary process of attachment. Where there exists any *doubt* whether the award is good, the Court will refuse to enforce it by attachment, and will leave the party to his action upon it. It has been decided that where there exists any objection to an award which would be *pleadable* in an action upon that award, the Court will not grant an attachment; *In the matter of Cargey & Aitcheson* (b). Such objections as that there was corruption on the part of the arbitrator, or that he did not proceed regularly, cannot be *pleaded*, but can only be raised by way of *motion* to *set aside* the award; but an objection that the arbitrator has *not decided on all the matters referred* to him, goes directly to the essence of the award, and may be *pleaded*, and therefore constitutes a ground for discharging a rule nisi for an attachment. In *Mitchell v. Stavely* (c), which was debt on bond conditioned to perform an award under a reference of *all matters in difference* between the parties, it was held to be a *good plea in bar*,—that at the time of the submission, a claim by the defendant of an indemnity against certain negotiable bills of exchange, was a matter in difference between the parties, and that the arbitrator, before making his award, had notice thereof, but had not made or given any award or direction touching or concerning it, and that divers of those bills were outstanding. *Winter v. Munton* (d), *Randall v. Randall* (e), were also cited.

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(a) *Vide ante*, ii. 444.

2 Bingh. 199; 9 B. Moore, 381.

(b) 2 Dowl. & Ryl. 222; *Cargey v. Aitcheson*, 3 D. & R. 433; 2 Barn. & Cress. 170; *S. C.* in error,

(c) 16 East, 58.

(d) 2 B. Moore, 728.

(e) 7 East, 81.

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Sir *J. Scarlett* and *Miller* contra. Undoubtedly an award which is not final is bad; but in this case it is good upon the face of it, and on cause shown against a rule for an attachment, facts *dehors* the award will not be taken into consideration. Where upon the face of an award, its invalidity appears, or its validity is doubtful, the Court will not enforce the performance of it by attachment;—and for obviously good reasons. But they will not entertain objections raised only upon *affidavits* in opposition to the motion for an attachment, and which the party seeking to enforce the award has no opportunity of answering. If such objections were entertained, the remedy by attachment would be practically destroyed. In an action upon an award it is no plea that the arbitrator has not decided upon all the matters referred to him, unless that fact be apparent upon the face of the award taken in connection with the submission. In *Waller v. King*(a), the Court of Chancery refused to vacate an award, on the ground of hardship or unreasonableness appearing only upon the bill and answer. Where there is any objection to an award which cannot be brought before the Court except by affidavit, it must be taken by way of motion to set aside the award. [Lord Denman, C. J., I see that Mr. *Tidd* lays down the rule exactly as you say it is (his lordship here read at some length from *Tidd's Practice*, (b).) There is great sense in the distinction which he takes.] That distinction is taken in a numerous class of cases, many of which, it is believed, are referred to in Mr. *Tidd's* work.

LORD DENMAN C. J.—I think the case falls within the common rule, that a party cannot show cause against a rule for an attachment for non-performance of an award, except for matter apparent upon the face of the award. This rule, which is clearly laid down by Mr. *Tidd*, is a sensible rule of practice.

(a) 9 Mod. 63, 2 Eq. Abr. 292.

(b) 9th edit. 845.

TAUNTON, J.—I have entertained a doubt upon one point, and one only, which was as to the *discretion* of the Court; but I am satisfied that my doubt was unfounded. Though believing the decision in Michaelmas term 1833, upon the motion to set aside this award, a correct decision^(a), yet it struck me for a while that we might *now* look at the circumstances of the case in order to guide our discretion; but I think it much better to abide by the general rule of law, and that the objection to the award on grounds extrinsic of the letter of it, ought not to be entertained at this stage of the proceedings. If matter of objection is apparent on the face of the award it may be urged at any time, but that is not so when the objection arises out of extrinsic facts.

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WILLIAMS, J. (b)—I am of the same opinion. To allow this objection to be urged now, would be to invert the order of the proceedings. It would be to make the shewing cause against a rule for an attachment, the same thing as a motion for setting aside the award, with this difference only, that the other party would have no opportunity of answering the affidavits.

Rule absolute. (c)

- (a) *M'Arthur v. Campbell*, ante, 6 T. R. 161; *Braddick v. Thompson*, 8 East, 344; *Brasier v. Bryant*, 3 Bingham, 167; 10 B. Moore, 587; *Anon.* 1 Lord Kenyon, 118.
(b) *Pattison*, J. had left the Court.
(c) And see *Holland v. Brooks*,

LONGSTAFF and another v. MEAGOE.

TROVER for fixtures, tried before Lord Denman, C. J. at Westminster, at the sittings after Michaelmas term last. 26 September, 1822. *Ansley* demised by indenture a house in Conduit Street, Hanover Square, to *Nightingale*, for 25 years. *Nightingale*, besides a premium for the lease, paid *Ansley* for the fixtures then on the premises.

The forcible taking possession of a house and fixtures by the assignee of a term in the house, is not a conversion of such fixtures.

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Nightingale, who carried on the business of a tailor, fitted up a part of the house as a tailor's shop, and for that purpose placed other fixtures on the premises.

30 April, 1824. *Nightingale* assigned the term to the defendant by way of mortgage, to secure 1000*l.* money borrowed.

24 December, 1824. *Nightingale* assigned all his estate and effects to the plaintiffs for the benefit of his creditors.

November, 1828. The plaintiffs were put into possession of the house and fixtures by *Nightingale*, and were about to sell the fixtures, but were induced to desist in consequence of a proposal from the defendant; which proposal was not, however, carried into effect. The plaintiffs were subsequently forcibly turned out of possession by the defendant. There was no evidence that any of the fixtures had been erected after the mortgage. It was objected on the part of the defendant, *first*, that trover would not lie for fixtures; and secondly, that there was no tortious conversion in this case, because the defendant had a right to enter as assignee of the term, and the fixtures passed by the assignment. The jury assessed the value of the whole of the fixtures at 80*l.*, and found that the defendant had taken forcible possession. The Lord Chief Justice was of opinion, that the keeping possession after the forcible entry was not a conversion, and directed a nonsuit, giving the plaintiffs permission to move to enter a verdict for 80*l.* In Hilary term last, a rule nisi was accordingly obtained by Sir *James Scarlett*; against which,

Campbell, A. G. now shewed cause. *Colegrave v. Dias-Santos(a)*, shews that trover cannot be maintained for fixtures attached to the freehold. No distinction was made at the trial between household and other fixtures; nor was evidence given to shew that any of the fixtures had been erected subsequently to the mortgage.

(a) 3 Dowl. & Ryl. 355; S. C. 2 Barn. & Cress. 76.

The taking possession of the house by the defendant could not be a conversion of the fixtures.

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Sir *James Scarlett*, and *Stephen Temple*, in support of the rule. *Colegrave v. Dias-Santos* does not determine that trover cannot be maintained for fixtures. In that case the owner of the freehold of a house sold it by auction, and nothing was said in the conditions of sale, or in the subsequent conveyance to the purchaser, as to the fixtures which were at the time in the house. It was held, that the fixtures passed by the conveyance, and that the vendor, after giving them up, could not bring trover for them. Nothing further is established by that case. In *Pitt v. Shew* (a), the declaration was in trespass, for breaking and entering the plaintiff's house, and for taking divers goods, chattels and effects; and the Court held, that the plaintiff might recover the value of fixtures under these words. Where the articles can be severed without injury to the freehold, and are such as are usually valued between landlord and tenant, they may be considered as chattels, and are recoverable in an action of trover;—*Davis v. Jones* (b). The assignment to the defendant, of the term in the house, could not give him a title to the fixtures, unless there had been a delivery of the possession both of the house and fixtures. Here *Nightingale*, and through him the plaintiffs, were in the situation of mortgagors in possession, and had a right to remove the fixtures; and their being prevented by force from so doing, could not take away that right. Some of the articles were not affixed to the freehold in any way, and therefore, for those articles at least, the plaintiffs were entitled to a verdict.

Lord DENMAN, C.J.—The opinion of the jury was not taken as to any particular articles of furniture, whether they were fixtures or not; but they were, I think, merely called upon to estimate the value of articles, which appeared to

(a) 4 Barn. & Ald. 206.

(b) 2 Barn. & Ald. 165.

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be assumed to have been fixtures. Upon that being decided, and upon its being also found that the defendant had taken forcible possession of the house, a question did arise whether his taking forcible possession of the house by virtue of the mortgage deed, and keeping it under these circumstances, could amount to a conversion of those things so called fixtures. Upon that point, the case of *Colegrave v. Dias-Santos* was supposed to apply. I thought that it could not be called a conversion, because the articles might at that moment, for aught I knew, be attached to the freehold. They were only in the defendant's *custody*; and my doubt was, whether, as the defendant had possession of the house, there were *any* articles in the house in respect of which trover could be maintained against him. That is the substance of what passed at the trial; and I have no evidence at all that any part of those fixtures had been erected after the execution of the mortgage deed, under which the defendant claimed. The fixtures, therefore, were subject to the same right as the possession of the house.

TAUNTON, J. concurred. *

PATTERSON, J.—The plaintiff might, if he had insisted upon it, have gone to the jury, as to what were and what were not fixtures; but that does not appear to have been done. They seem to have been taken as a *class*. I do not think that this action was maintainable for those articles which were *fixtures*.

WILLIAMS, J. concurred.

Rule discharged (a).

(a) And see *Place v. Fagg*, case, *ibid.* 280 n; *Hare v. Horton*, 4 Mann. & Ryl. 277; *Wystow's ante*, vol. ii, 498.

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The KING v. The Inhabitants of COTTINGHAM.

ON appeal, an order for the removal of a pauper from Cottingham to Patrington, was at the quarter sessions for the East Riding of Yorkshire, in July, 1833, quashed "*for informality with costs.*" In Michaelmas term, 1833, a certiorari issued, directing the justices to certify to this Court, the order of removal, and the order of sessions quashing it. The orders were accordingly returned, and the order of removal appeared, upon the face of it, to be good. A rule nisi, to quash the order of sessions, having been obtained,

An order of sessions quashing an order of removal "*for informality,*" was confirmed by this Court, although the order of removal appeared upon the face of it to be free from defect.

Hildyard now shewed cause. By the record it simply appears, that the order was quashed *for informality*. It does not follow that the Court of Quarter Sessions quashed the order of removal *for informality apparent on the face of it*. A variety of cases of informality, in which the informality is not apparent on the face of the order of removal, may be instanced. Thus, suppose that the two justices who made the order, took the examination of the pauper *separately*; or, that the pauper was at the time irremovable by reason of residence upon his own estate, as in *Rex v. Wick St. Lawrence* (a); or, that he required no relief; or, that the order, or copy of the order, was not produced at the sessions. All these are cases in which the sessions might quash the order of removal *for informality*, and in which that informality would not be apparent on the face of the order. It is certainly very desirable that the sessions should state the grounds upon which they quash an order of removal; but this Court has no authority to require them either to state a case or make an entry of the grounds of their judgment.

The Court will in such a case intend, that the sessions used the word "*informality*" as expressive merely that their decision had proceeded upon grounds distinct from the *merits* of the appeal.

This Court will entertain no objection to an order of sessions which upon the face of it does not appear to be *necessarily* bad, unless the particular facts are brought before the Court by a special case.

The sessions have power to grant costs under 8 & 9 Will. 3, c. 30, s. 3, in all

(a) *Ante*, ii. 289.

cases in which an appeal has been entered and *determined*, whether the be upon the *merits* or for *defect of form*.

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Cresswell and *Henry*, contra. The order of sessions professes to quash the order of removal *for informality*. Now, the only thing susceptible of *form*, is the order of removal itself; and therefore it must be inferred, that the order was quashed for some defect supposed to be *apparent on the face of it*. All cases of *informality* are such as can be *amended*. The cases which have been put in the argument as matters of *form*, are in truth matters of *substance*. In the case of the two magistrates adjudicating separately, the defect is in matter of substance, not of form. So, non-chargeability is matter of substance. So also of *irremovability* arising from circumstances similar to those in *Rex v. Wick St. Lawrence*.

A second objection to the order of sessions is, that it gives *costs*. The sessions have no power to give costs when they quash an order *for informality*. By 8 & 9 Will. 3, c. 30, for "the more effectual preventing of vexatious removals and frivolous appeals," the sessions upon any appeal before them, concerning the settlement of any poor person, are directed to order costs, as they shall think reasonable, to be paid by the party against whom such appeal shall be *determined*. It appears to have been intended that costs should be granted in those cases only where there is a *settlement* of the matter in dispute. The object of the enactment was to prevent vexatious removals or appeals, and the reason of it therefore applies only to cases in which the appeal has been decided *upon the merits*, and cannot extend to a case in which the order of removal is quashed *for informality*.

LORD DENMAN, C. J.—The justices at sessions have absolute dominion over the law and facts of every case that comes before them; and upon the subject of those cases we can know nothing but what they think proper to state to us. They have in this case quashed an order of removal on the ground of *informality*, without stating what that *informality* was. It is argued that "*informality*"

necessarily means some defect in the form of the order itself, and apparent upon the face of it; but I cannot admit that argument to be correct. I think that the magistrates, when they state that they have quashed the order for "informality," must be understood as saying no more than that they have not decided upon the *merits*. It is very right that they should make such a statement, when the *merits* are not adjudicated upon, as otherwise their judgment might be *binding* on the parties at a future period. It is very probable that the magistrates may have used the word "informality" not in its strict sense, but merely with a view to prevent the unjust consequence to which I have adverted.

Then it is said that the magistrates have exceeded their jurisdiction by granting *costs*; and if the act had said that they should grant no costs, except when a case was decided *on the merits*, this would have been a good objection to the order; but that is *not* the enactment. It is said that the object of the act was to prevent vexatious removals, and frivolous appeals, and that the sessions have no right to say, that the appeal is frivolous, unless they have inquired into *the merits*. The objection, however, whatever it was, prevailed; and we may say, that the removal *was* vexatious, if it was made under any of those circumstances, which, though the Court may call them informalities, are in fact matters of substance, as affecting the *jurisdiction* to remove. I do not think that, in order to enable the magistrates to award costs under this statute, the determination of the appeal must be upon the *merits*. The sessions have *determined* this appeal; and therefore, it seems to me, they were at liberty to give costs. In *Rex v. The Justices of Essex* (a), notice of an appeal against a rate was given, but countermanded the day before the sessions, and no appeal was entered; and it was held, that the sessions had no power to give costs; but that was on the ground that the *entry* and *determination* of the appeal were in the nature of

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conditions precedent to the granting of costs. Here, the appeal was entered and it has been determined, and this, I think, is all that is required to give jurisdiction as to costs.

TAUNTON, J.—In questions of settlement, the proceedings of the Court of Quarter Sessions may be erroneous in either of two ways:—There may be a defect in the face of the original order; and if such an order is confirmed, all that is necessary to be done, is to bring the order of confirmation up by certiorari, and move this Court to quash it:—Or there may be an informality in *some part of the proceedings*, not appearing upon the face of the order, but only to be shewn by *extrinsic* circumstances, and existing in matters *collateral*; and *such* informality can only be brought before this Court in a special case. There appears to be no informality upon the face of the order; and no *extrinsic* informality has been brought before the Court by a *special* case. If this Court sees that something *might* have existed which would make the order for quashing the appeal “for informality” right, and there is no special case disclosing in what that informality consists,—the order of sessions must be confirmed. I will not say that I agree that all the instances which have been put, are instances of informalities; but that of the magistrates sitting separately, is an instance of an informality in the proceedings, for which the order must have been quashed for informality, and not upon the merits:—That, therefore, is a possible case, in which the order might be quashed for an informality not apparent on the face of it. I do not think that the case put of a pauper not being *chargeable*, would be a mere *matter of form*; nor do I think that the case of a pauper being irremovable by reason of his living upon his own freehold, is a proper instance of *informality*. It is sufficient to say that a case *may* have existed which would form a good ground for the decision of the sessions. Looking then at the order itself, that order appearing to be proper on the face of it, and there being no special circumstances brought

up on a special case, from which it appears that the sessions have come to a wrong decision, I think that the order must be affirmed. It is a most wholesome rule, (which has existed ever since cases on questions of settlement law have been brought up to this Court,) that this Court shall not exercise any jurisdiction over extrinsic matters connected with orders of sessions, unless the Court below has felt such a doubt upon the question as to reserve the point for the decision of this Court on a special case, stating all the circumstances out of which the difficulty arises; and there is every reason to abide by this rule.

Upon the question of costs, I fully agree in the opinion pronounced by my Lord. It appears to me that the statute is fully sufficient to enable the sessions to give costs as well when they quash for *informality*, as when they quash upon the *merits*. There are no restrictive words.

PATTERSON, J.—This case entirely depends upon the sense in which this Court are to understand the word “*informality*,” as used by the sessions. If the word “*informality*” is to be understood in the strict legal sense of want of *form*, the sessions ought not to have quashed the order, for certainly there is no such want of form; but if the word is to be understood in the larger sense,—as contradistinguished from a decision upon the *merits*, (and in such sense I think that the sessions intended to use it,)—we have no means of deciding the case at all. The sessions have decided it, and they have not granted a case. This Court may bring the order of sessions before them by certiorari; but they can do nothing with it when it is here, unless a case has been granted, or unless the objection appears upon the face of the order itself.

With respect to the question of costs, I think that the sessions have the authority alluded to; and I entirely agree, that there being no restrictive words, the magistrates have

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power to award costs, whether the *merits* have been adjudicated upon or not.

WILLIAMS, J. concurred.

Rule for quashing the order of Sessions discharged.

AYRE v. CRAVEN.

In an action on the case for defamation, for words charging a physician with adultery, it is not sufficient (unless special damage be alleged,) to state that the misconduct was imputed to the plaintiff in *his profession*.

The declaration ought also to set forth in what manner such misconduct was connected by the speaker with that profession.

Therefore where the declaration alleged that words containing such an imputation were spoken of and concerning the plaintiff carrying on the profession of a physician, and of and concerning him in *his profession*, without more, judgment was arrested.

Whether words imputing to a physician that he had taken advantage of the opportunities afforded him by his profession, to commit acts of adultery, would be actionable without special damage, *quære*.

CASE for defamation. The declaration stated as inducement, that the plaintiff used, exercised, and carried on the profession of a physician; that there had been and was a rumour and report in and about H. and its neighbourhood, that a physician residing at H. had been criminally connected with a married woman and was guilty of adultery; and that the defendant, intending to have it suspected and believed that the plaintiff and one ———, then and long before, and still being the wife of ———, were the persons meant and intended by the said report, and maliciously intending to injure and prejudice the plaintiff in his good fame and credit, and to cause it to be suspected and believed that the plaintiff had been and was guilty of adultery, and that he carried on an adulterous intercourse, and was criminally connected with a married woman, and that he was an improper and unfit person to be employed as such physician as aforesaid (a).

The third count charged, that in a certain discourse

(a) The words laid in the first, second, and fourth counts, not having been proved, were abandoned at the trial by the plaintiff, and the third count only was relied upon.

which the defendant had in the presence and hearing of divers subjects of the realm, and particularly in the presence and hearing of *J. B. B.* and *C. H. P.*, of and concerning the said plaintiff so carrying on the said profession as aforesaid, and of and concerning the said rumour and report, the defendant, (falsely and maliciously contriving and intending to have it believed that the said plaintiff had been guilty of a criminal connection with a married woman,) in the presence and hearing of the said last-mentioned subjects, spoke and published the several false, scandalous, &c., words following, of and concerning the said plaintiff, so carrying on such profession as aforesaid, and of and concerning him in his said profession, and of and concerning the said rumour and report, that is to say; "Have you heard that it is out who are the parties to the crim. con. affair, which has been so long talked about," (meaning the said rumour and report, that a physician at H., had been criminally connected with a married woman.) And the said *C. H. P.* having demanded of the said defendant, what medical man it was, the defendant falsely answered "*Dr. Ayre*," (thereby meaning that the plaintiff had been guilty of criminal connection with a married woman and that he was the person alluded to in such report.) There was a verdict for the plaintiff upon this count with 40s. damages.

Alexander obtained a rule to shew cause why the judgment should not be arrested, on the ground that the words were not actionable without special damage.

F. Pollock, *Wightman* and *Raines*, in last Trinity term, showed cause. The charge was manifestly calculated to injure the plaintiff in his profession of a physician. To say to a physician, for the purpose of discrediting him with his patients, "Thou art a drunken fool and an asse; thou wert never a scholer, nor ever able to speak like a scholer," was held actionable, because the words discredited the

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plaintiff in his profession. *Cawdry and Tetley's case* (a). This and other cases are referred to in Com. Dig., *Action on the Case for Defamation* (D. 22), where it is said generally, that words which slander a man *in his profession* are actionable. The words laid in the third count are alleged to have been spoken "of and concerning the plaintiff so carrying on such profession (of a physician) as aforesaid, and of and concerning him *in his said profession*," and they are obviously calculated to disparage and injure the plaintiff in that profession.

Alexander and Follett, contra. These words are not actionable without special damage. In *Parratt v. Carpenter* (b), the declaration stated that the plaintiff was parson of D. and a preacher, and that the defendant spoke these words—"Parratt (meaning the plaintiff) is an *adulterer*, and hath had two children by the wife of J. S., and I will *cause him to be deprived for it*." After verdict, the Court held, that the slander was examinable in the Spiritual Court only, and gave judgment for the defendant. That case goes the whole length of the present case. Can there be any doubt that a charge of adultery would injure a *clergyman* in his profession, fully as much as it would injure a *physician* in his profession? There have been many cases, and one of late years, in which clergymen have been *deprived* for incontinence. A charge of incontinence in a *woman*, is not actionable without special damage. The cases collected in Com. Dig., of words spoken of a man in his profession of a physician, are all cases of words which have reference to his *talents* and his *qualifications* to carry on his profession, and impute want of *knowledge*, want of *skill*, or want of *care* in his profession. And so of the cases cited of slander in other professions, the words have all a direct reference to the plaintiff's qualification in his profession. In *Lumby v. Allday* (c), it was held, that

(a) Godbolt, 441.

(b) Cro. Eliz. 502.

(c) 1 Crompt. & Jerv. 301; 1 Tyrwh. 217.

" words to be actionable as spoken of a man in his office, must be spoken of him in reference to his character or conduct in such office, and must impute to him the want of some qualification for, or misconduct in, his office."

The declaration in that case stated that the plaintiff was clerk of a gas company, and had behaved himself as such with great propriety, and had thereby acquired, and was daily acquiring, great gains; but that the defendant—to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation—spoke of him these words, " You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores," &c.; and it was held that the words were not actionable.

Boyley, B., in giving judgment upon that point, said, " Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those *qualities which a clerk ought to possess*, and because the imputation has no reference to his conduct as clerk." The authorities establish this position; that unless the words spoken of a man in his profession contain a charge of *professional incapacity*, they are not actionable without special damage. It is very true that a charge of incontinence is calculated to injure a man in his profession of a physician, and probably, in this case, injury has been sustained by the plaintiff in his profession; but if so, that fact should have been stated. A physician is not more bound to be chaste than any other person. There is no reason why an imputation of want of chastity should be actionable without special damage in the case of a physician, more than in the case of any other person. The words, to be actionable without special damage, ought at all events to have been

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connected much more intimately with the plaintiff's profession than is done by this declaration. *Hartley v. Hexring* (a), *Moore v. Meagher* (b), and *Hunt v. Jones* (c).

LORD DENMAN, C. J.—We will take time to consider, but I would observe that our impression is at present against you, Mr. *Alexander*.

Cur. adv. vult.

LORD DENMAN, C. J., in this term, delivered judgment.—There are obvious and very good reasons for the jealousy with which the Courts have always regarded actions of *slander*, particularly those in which no *indictable offence* has been imputed. Here the plaintiff states the grievance as affecting him in his business, office, or profession, without, however, charging that any actual *damage* has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail to excite surprise;—a clergyman having failed to obtain redress for the imputation of adultery (d), and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution (e). Such words were undeniably calculated to impede the *success* of the plaintiffs in their several professions, but not being applicable to their *conduct* therein, no action lay. The doctrine to be deduced from the older cases, was recently laid down, after a full discussion, by *Bayley, B.*, who says (f), “Every authority which I have been able to find either shews the want of some general requisite, as honesty, capacity, or fidelity,—or connects the imputation with the plaintiff's office, trade, or business.” In that case, accordingly, where a verdict had been recovered by the clerk of a gas company, on a declaration alleging that the defend-

(a) 8 T. R. 130.

(b) 1 Taunton, 39.

(c) 1 Cro. Jac. 499.

(d) *Parrett v. Carpenter*, Noy, 64.

(e) Per *Twisden, J.*, in *Wharton*

v. *Brook*, 1 Vent. 21.

(f) 1 Crompt. & Jerv. 301;

S. C. 1 Tyrwh. 217.

ant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him, "you are *unfit* to hold your situation," and then imputed incontinence as the reason of his unfitness,—the Court of Exchequer thought that the judgment ought to be arrested.

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In the present case much doubt was entertained whether the words were not actionable within the rule just adverted to. For being laid as spoken of the plaintiff *as a physician*; (in which character he may have opportunities of abusing the confidence reposed in him to commit acts of criminal conversation,) it appeared to us doubtful whether the statement might not be considered large enough to admit such proof to be adduced on the trial; in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But after full examination of the authorities, we think that in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff *in his profession*, but also to set forth *in what manner* it was connected by the speaker *with* that profession. For this defect the judgment must be arrested.

Judgment arrested (a).

(a) *Vide Collins v. Carnegie, ante, iii. 703.*

SMITH, qui tam, v. GILLETT.

Same v. Same.

TWO actions of debt, for penalties, had been commenced against the defendant, as printer and publisher of a newspaper, the bringing of actions for penalties "incurred by virtue of that or any other act relating to the stamp duties," unless prosecuted in the name of the attorney-general, or of the solicitor of stamps,) applies only to cases in which the *subject-matter of the action* relates to the stamp duties. The enactment in 44 Geo. 3, c. 98, s. 10, (prohibiting the bringing of actions for penalties, incurred by printing and publishing a newspaper without complying with the regulations imposed by 38 Geo. 3, c. 78, secs. 2, 4, 7, and 10, although that act contains various provisions relating to the stamp duties.)

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paper, called "The Royal Cornwall Gazette, Falmouth Packet, and Plymouth Journal," for a violation of the provisions of 38 Geo. 3, c. 78(a). The first action was to recover a penalty of 100*l.* for printing and publishing the newspaper without its containing the true names and addition of the printer and publisher. The second action, containing 104 counts, was brought to recover 104 penalties of 100*l.*, incurred by the defendant for printing and publishing the newspaper, without signing, swearing or affirming, or delivering, an affidavit specifying and setting forth a change in the place of abode of the defendant, and a true description of the printing-house to which the defendant had changed and wherein the newspaper was printed.

The 10th section of 44 Geo. 3, c. 98, provides, "that it shall not be lawful for any person to prosecute any action in any of his majesty's Courts against any person for the recovery of any fine, penalty, or forfeiture, made or incurred by virtue of this or *any other act or acts of parliament relating to his majesty's stamp duties*, or any other duties under the management of the commissioners of the duties on stamped vellum, parchment, and paper, for the time being, unless the same be prosecuted in the name of his majesty's attorney-general, or in the name of the solicitor of his majesty's stamp duties in England, &c.—and if any action shall be prosecuted in the name of any other person, the same and every proceeding thereupon had are declared null and void to all intents and purposes."

The plaintiff is not the solicitor or any other officer of his majesty's stamp duties in England,—nor was he authorized by the attorney-general, or by the solicitor or any other officer of his majesty's stamp duties, to prosecute these actions.

In the early part of this term, *Smirke* obtained a rule nisi to set aside the proceedings with costs, on the ground that the proceedings were void.

(a) Intituled "An act for preventing the mischiefs arising from printing and publishing newspapers and papers of a like nature by

persons not known, and for regulating the printing and publishing such papers in other respects."

Stephen, Serjt. now shewed cause. These actions are not within 44 Geo. 3, c. 98, s. 10, for they are not brought in respect of the violation of any enactment *relating to the stamp duties*. They are founded on sections 2, 4, 7 and 10 of 38 Geo. 3, c. 78, none of which sections relate to the stamp duties. It is admitted that the *eighteenth* section of that act does relate to the stamp duties; but the question is not whether the action is brought upon a *statute* in which there are any provisions relating to the stamp duties, but whether it is brought for a *penalty for any matter relating to the stamp duties*. [Lord Denman, C. J. The object of the legislature in enacting the provisions of 38 Geo. 3, c. 78, is expressed in the title of the act (*a*), which says nothing as to stamp duties.]

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Smirke, in support of the rule. The 38 Geo. 3 is "An act relating to his majesty's stamp duties." The 18th section imposes a penalty on any person wilfully printing or publishing any newspaper not being printed upon paper *duly stamped*; and many other sections of the act relate to the stamp duties. One of these actions contains no less than 104 counts. The object of the 44th Geo. 3 was to prevent the prosecution, by officious persons, of harassing and oppressive actions for penalties incurred according to the strict letter of the law, but which a responsible public officer would not think it right to prosecute. The title is no part of an act (*b*). The 38 Geo. 3 has a double aspect—to regulate the publication of newspapers—and the stamp duties imposed upon them. It does not follow that because some of the provisions of a statute contain regulations not immediately connected with that part of the revenue, therefore the act does not *relate* to the stamp duties. If the whole of the act be read, it will plainly appear that it does relate to the stamp duties. This application has been made at the suggestion of the officers of the stamp duties.

(a) *Supra*, 226, (a).

(b) *Vide Dwaris on Statutes*, 217.

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LORD DENMAN, C. J.—It does not follow that because some single clause in a long statute may give a penalty respecting a stamp, it is to be called “An act relating to his majesty’s stamp duties.” The best rule we can lay down is, that in each particular action the question must be, whether the *enactment* upon which the proceeding is founded relates to the stamp duties—whether the act of parliament relates to the stamp duties *with reference to the subject-matter of that action*. This is an action brought for penalties for the violation of *enactments*, the object of which had no relation to the stamp duties. It appears to me, therefore, that it was not necessary in this case to obtain the sanction of his majesty’s attorney-general, or of the commissioners of stamps.

TAUNTON, J.—I am of the same opinion. I think that the 10th section of the 44th Geo. 3, c. 98, must receive a construction confining it to actions, bills, complaints, or informations in any of his majesty’s Courts *wherein the subject-matter of the proceeding itself* relates to the stamp duties. I am very sorry to be obliged to come to this conclusion, because I am fully satisfied that the purposes of public policy would be much better attained if prosecutions of this sort were not within the reach of officious, and, generally speaking, I fear, *corrupt*, common informers, but were lodged exclusively in the hands of some responsible officer of the crown.

PATTERSON, J. and WILLIAMS, J. concurred.

KING v. BAKER.

REPLEVIN. In replevin, the defendant makes cognizance, first, under a demise by *A.* to *B.*; secondly, under a demise from *B.* to the plaintiff. Plea in bar to each cognizance, non tenuit. The defendant may at the trial abandon the second cognizance, and examine *B.* in support of the first issue, *B.* stating on the voir dire that he did not employ the attorney. The defendant made cognizance, first, as bailiff to the commissioners for repairing Staines Bridge, on

a demise by them to one *Ramsbottom*; secondly, as bailiff to *Ramsbottom*, on a demise by *Ramsbottom* to the plaintiff. The plaintiff pleaded non tenuit to each cognizance.

At the trial before Lord *Denman*, C. J., at the sittings at Westminster after last Hilary term, it appeared that the dispute was, whether the plaintiff occupied the premises as the *servant* or as the *tenant* of *Ramsbottom*. The defendant proposed to examine *Ramsbottom* upon the issue raised by the *first* cognizance, and offered to abandon the *second* cognizance. *Ramsbottom* stated on the voir dire that he did not employ the attorney in the suit. The plaintiff objected to the admission of *Ramsbottom* as a witness, on the ground that he was in effect a *party* to the suit; and it was urged that he stood in the same situation as the lessor in ejectment. The lord chief justice was of opinion that *Ramsbottom* was a competent witness, and received his evidence. Verdict for the defendant on the issue upon the first cognizance.

In the following term, *Campbell*, A. G., obtained a rule nisi for a new trial, on the ground that *Ramsbottom* was an incompetent witness.

Sir *James Scarlett* and *Adolphus* now shewed cause. At the trial it was contended that *Ramsbottom* was in truth a *party* to the suit; and he was likened to the lessor in ejectment. The answer to this objection is, that in ejectment, the lessor is regarded as the party to the suit *on the record*. Not so a party under whom cognizance is made in an action of replevin. The defendant was at liberty to abandon (as he offered to do) one of the cognizances. He could not have retained a verdict on both the issues. In 5 *Coke's Reports* (a) the following case, from the Year Books (b), is cited. "One brought a replevin against two

(a) 19 a, *Slingsby's case*.

(b) P. 3 H. 6, 44 b. The case is cited from the argument of *Martin*, who says, "I once saw, when *Twist* and *Clapton* were first

made serjeants, that one brought a replevin for an execution against two persons, who made several avowries," &c.

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persons for an ox, who made several avowries, each by himself in his own right (a); and there, by the advice of all the justices, both the avowries abated for the inconvenience, that if both the issues should be found for the avowants, the Court could not give judgment on them for one and the same thing." This case is adopted by Lord Coke, and used by him to illustrate the law with respect to covenants. If a distress is made at one time on separate goods, there is no doubt that two parties may avow separately. At the commencement the defendant might make as many avowries or cognizances as he pleased, with respect to *different* goods, but he could not make two avowries or cognizances for the *same* goods. If he did so, he was obliged to elect one upon which to rest his case (b). The avowries would be *inconsistent*; and if he had a verdict on one, he must abandon the other. In this case it could not have been proved that the party was tenant of the same premises, to *Ramsbottom*, and also at the same time to another person *unconnected* with him. The defendant therefore had a right to say, "I can have a verdict on the one, and I renounce the other." After that renunciation, *Ramsbottom* was called to prove that the plaintiff did not hold under him. No case can be found which lays down in general terms, that a party under whom cognizance is made, is not a competent witness. *Upton v. Curtis* (c) was cited at the trial; but the report of that case is evidently inaccurate, since it states that the cognizance which raised the question, and to which the whole argument had reference, was abandoned (d). The witness in *Upton v. Curtis* was deemed incompetent, not on the ground that he was a party under whom cognizance was made, but because he was, in point of fact, interested in the *event* of that suit. [Lord Denman, C. J. The rule was obtained also on *Golding v. Nias* (e).] That

(a) In the original, the reporter, or rather *Martin*, adds, "in which case they ought to have pleaded severally with the plaintiff."

(b) i. e. supposing the plaintiff

not to have demurred for duplicity.

(c) 1 Bingh. 310.

(d) Vide *S. C.* more fully reported, 8 B. Moore, 52.

(e) 5 Esp. Rep. 279.

case will be found, upon investigation, never to have decided this question. [Lord Denman, C. J. In *Hart v. Horn*(a) it was held, that *declarations* of the person under whom the defendant makes cognizance, are not evidence for the *plaintiff*. That must have been on the ground that he was himself a good witness for the plaintiff.]

The late statute of 3 & 4 Will. 4, c. 42, s. 26(b), rendered the witness competent, supposing him not to have been so without the aid of that statute.

Campbell, A. G., and Archbold, in support of the rule. In deciding the present case, the general question must be determined, whether a party under whom cognizance is made, is a competent witness. As to the case from the Year Books, the Court ordered the avowries to abate. There was no application to the Court to *withdraw* the second cognizance. There is no such proceeding as *abandoning* a plea. The second cognizance must be taken to be a real and substantial defence to the action. Upon the face of the cognizance the defendant insists that rent is due to *Ramsbottom*, and claims a return of the goods to *Ramsbottom*. Suppose *Ramsbottom* had been an avowant, would he have been a competent witness? He would not(c). Avowries are considered as similar to declarations for rent(d). In replevin both parties are *actors*, the plain-

(a) 9 Campb. 92.

(b) Section 26 is as follows:—

"And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in

that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him."

(c) Sed vide *Johnson v. Mason*, 1 Esp. N. P. C. 89; *Hart v. Horn*, 2 Campb. 92.

(d) Vide Co. Litt. 303, a.

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tiff, as suing for compensation for the injury done by the wrongful taking of his goods; the defendant, as seeking to obtain security for his rent, or to enforce some other right against the plaintiff. *Hart v. Horn* does not decide the question in this case. There, cognizance was made as bailiff to one *Massey*, for rent, and it was proposed to give in evidence a *declaration* made by *Massey* in the plaintiff's favour. It was urged that *Massey* was clearly a good witness for the plaintiff; and *Heath, J.* was of opinion that what *Massey* said was not evidence against the defendant. It does not follow that because he was a good witness for the plaintiff, to prove certain facts against his interest, that therefore he would be a good witness for the defendant.

The late act of parliament does not affect the question. The object of that act was not to enable a party to the suit on the record, or a person in the same situation, to become a competent witness; but to enable a servant (for instance) to be called, in an action against the master for negligence by his servant, to disprove the negligence. Formerly a verdict against the master might have been given in evidence against the servant, in an action by the master for the negligence of the servant (a). The objection is not that the verdict may hereafter be made use of, but that *Ramsbottom* had a direct interest to prevent the plaintiff from obtaining a verdict. *Ramsbottom* was interested in having the goods returned to him. Making cognizance in the name of a party is very different from justifying under a party in trespass. In replevin, the party under whom cognizance is made is the actor in the suit. In ejectment, on the demise of different lessors, the one cannot be a witness for the other. In an action on a policy of insurance effected by a broker, where an interest is averred to be in *A.* and in *B.*, the one cannot be a witness for the other; *Bell v. Smith* (b). *Golding v. Nias* is precisely in point. There the defendant made cognizance,

(a) Vide *Morish v. Foote*, 8 Taunt. 454, 2 B. Moore, 508.

(b) 7 Dowl. & Ry. 846; 3 C. 5 Barn. & Cressw. 188.

first, under one *Nicholas Fell*, who was stated to be the party beneficially entitled; secondly, under *Wadeson*, who was stated to be a trustee for *Fell*. *Wadeson* was called as a witness, and Mr. Justice *Chambre* held him not admissible. *Upton v. Curtis* establishes the same in effect; although it is not so expressly in point as *Golding v. Nias*.

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Lord DENMAN, C. J. on a subsequent day in this term, delivered the judgment of the Court. After stating the pleadings, and evidence, his lordship proceeded as follows:—

The disputed question of fact at the trial was, whether the plaintiff occupied as the servant of *Ramsbottom*, or as tenant under him. This issue the jury ultimately found for the defendant. One of the witnesses tendered by him in support of it was Mr. *Ramsbottom* himself, under whom the second cognizance was made. He was objected to as incompetent, being in truth a party to the suit placed forward by the defendant, (who called him as a witness,) as the person entitled to a return of the goods, if the plaintiff should fail in this action. He stated, however, on the voir dire, that he did not employ the attorney; and the defendant expressed his willingness to abandon the second issue. A rule was granted for the purpose of considering whether he was properly admitted, and after argument and consideration we think that he was.

We are of opinion that the defendant's offer to abandon the issue was tantamount to consenting that the verdict should be found against him on that issue. Such verdict might have been taken at the moment:—It must have been entered after the cause was tried, because the case presented for the defendant on that issue was directly contrary to that found in his favour. The witness, therefore, had become a stranger to the suit. He was in the situation of a person under whom a defendant justified a trespass, but who had

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not employed the attorney to defend; and after the defendant had submitted to a verdict on that issue, but required his evidence in proof of another: or he may be compared to a lessor of the plaintiff in ejectment, whose name is used without his concurrence, and on whose demise a verdict has been entered for the defendant, while he was a necessary witness in support of other counts. The nature of the action of replevin, indeed, raises this difference,—that the party under whom cognizance is made, is asserted by the defendant himself to be entitled to a return of the goods: but this assertion is only conditional,—if the defendant shall prove his issue; and it is in truth retracted by his submitting to a verdict thereon. Several authorities were quoted, none bearing on the point directly. The only case in banc is *Upton v. Curtis* (a), but there is reason to suppose that the facts are not reported with perfect accuracy, and the Court only held that an intermediate tenant under whom cognizance had been made (the distress being taken by the landlord) was not admissible to prove the amount of the sub-tenant's rent. This may have been because he had an interest in reducing his own rent by raising that of his tenant. One *nisi prius* decision of a most learned judge, Mr. Justice *Chambre*, was cited against the admissibility of the witness, from *Espinasse's Reports* (b). But the principle there seems to have been, that one under whom cognizance is made, and who is *primâ facie* the party, shall not be deemed competent merely because the legal estate in respect of which he distrained was held by him as a trustee for others,—a principle which does not clash with our present decision. We think that, under the circumstances of this case the witness stood indifferent, and that the rule for a new trial must be discharged.

Rule discharged (c).

(a) 1 Bingham 210; *suprà*, 230.

(b) *Golding v. Nias*, 5 Esp. 272; *suprà*, 230.

(c) And see *Dyke v. Aldridge*, cited 7 T. R. 665, and 11 East,

584; *Rex v. Woburn*, 10 East, 395; *Rex v. Hardwick*, 11 East, 578; *Compton v. Killegrew*, Mann. N. P. Digest, 2d ed. 326, 327; *Smith v. Lyon*, 3 Campb. 465.

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THE defendant gave a warrant of attorney, by the defeazance to which it was agreed, that it should be lawful for the plaintiff, his executors &c., to enter up judgment thereupon at any time he or they might think proper, notwithstanding that *twelve calendar months or upwards might have elapsed* from the day of the date thereof, or that *the defendant might be dead* at the time of entering up such judgment, without first applying to the Court for liberty so to do. The defendant died on the 8th of February last, and on the 11th of the same month, although the space of twelve calendar months and upwards from the date of the warrant of attorney had then elapsed, judgment was entered up, execution was issued, and the goods late of the defendant were seized. Administration was subsequently taken out by creditors; and in last Trinity term *F. Pollock* obtained a rule calling upon the plaintiff to shew cause why the warrant of attorney and judgment, and all proceedings thereon, should not be set aside; and why the proceeds of the executions should not be restored to the administrators. On the last day of the same term,

The Court set aside a judgment on a warrant of attorney, entered up, (even before the late rules of H. T. 4 Will. 4,) where the defendant was dead at the time of signing judgment,—although in the defeazance it was stipulated, that the plaintiff should, without leave of the Court, be at liberty to enter up judgment, notwithstanding the defendant's death.

Whether judgment entered up on a warrant of attorney more than twelve months old, without leave of the Court, but in pursuance of an express agreement on the defeazance that the plaintiff shall be at liberty to do so, is valid, *quære*.

Sir *J. Scarlett* and *R. V. Richards* shewed cause. In *Morris v. Jones* (a) it was held, that an agreement by the parties to the warrant of attorney, that execution shall issue upon the judgment after a year and a day, without reviving the judgment by sci. fa., is not illegal, and that execution may be taken out notwithstanding the stat. Westminster 2. In *Jones v. Jones* (b) it was held, that though by the practice of the Court judgment cannot be entered up on a warrant of attorney more than a year old, without the leave of the Court, yet none but the *defendant* himself can object to any irregularity in this respect. The defendant in this case had agreed to waive any objection of this kind, and by that agreement,

(a) 3 Dowl. & Ry. 603.

(b) 1 Dowl. & Ry. 558.

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his *representatives* are equally bound. Nor can an objection founded on the fact of the *death* of the defendant previously to the entering up of judgment prevail, for that event is provided for by the defeazance. Before the introduction of the late regulations of the Court, if a defendant died in the course of a term or in vacation, judgment might nevertheless be entered up on a subsequent day in the same term, or in the following vacation, and such judgment had relation back to the first day of term, and was valid. This was held in *Bragner v. Langmead* (a), and confirmed in *Calvert v. Tomlin* (b).

F. Pollock contrà. In *Calvert v. Tomlin*, the defendant had given a *cognovit*, and not a warrant of attorney. The distinction is pointed out by *Gaselee, J.* who expressly says, that "when judgment is entered up on a *warrant of attorney*, it must be shewn that the party is living, because if the Court know him to be dead, they will not allow judgment to be signed." The practice alluded to as established by *Bragner v. Langmead*, and *Calvert v. Tomlin*, relates only to cases in which the death of the defendant takes place within a year after giving the warrant of attorney. Here, the warrant of attorney was at the time of the defendant's death *more than* twelve months old. This objection is fatal, and it is such as could not be released by the defendant.

Cur. adv. vult.

Lord DENMAN, C. J. in this term delivered the judgment of the Court.

This was a motion for a rule to set aside the judgment signed on a warrant of attorney. There were two objections; of which one was, that the judgment was not signed within a year and a day from the date of the warrant of attorney; the other, that the defendant was dead at the time of the judgment being signed. The answer to these objec-

(a) 7 T. R. 20.

(b) 5 Bingh. 1; 2 Moore & Payne, 1.

tions was, that by the defeazance to the warrant of attorney it was expressly agreed, that the plaintiff should be at liberty, at any time, without application to the Court, to enter up judgment, though the year and a day should have elapsed, and though the defendant should be dead. Some cases were quoted, the principal of which is *Morris v. Jones* (a), where an objection, similar to the first of those taken in this case, was overruled by *Abbott*, C. J. who is reported in *Dowling* and *Ryland's Reports* to have said, "If the defendant thought proper to enter into a bargain that execution should issue upon the judgment, without a scire facias to revive it, he cannot afterwards be permitted to avoid the consequences, by setting up the illegality of the proceeding." The same case is reported in *Barnewall and Cresswell* (b), where the language of the Lord Chief Justice is much more qualified. There was also a case of *Jones v. Jones* (c) brought before us with reference to the first objection; which case, however, does not appear to us to be in point.

But we need not enter into any discussion upon the first objection, as our decision will proceed entirely upon the other,—that the party was *dead* at the time when the judgment was entered up. We do not think that the agreement that judgment should be entered up notwithstanding the defendant's death, can possibly be binding on his representatives, still less on the Court. It is laid down by Mr. *Tidd*, in his *Practice* (d), that "the death of either party is, generally speaking, a countermand of the warrant of attorney; and therefore, upon a motion to enter up judgment on an old warrant of attorney, if it appear to the Court that either party is dead, they will not grant the motion." The only exception to this, it appears, is *Chancy v. Needham* (e). There "a motion was made to enter up judgment on an old warrant of attorney, and an affidavit was pro-

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(a) 3 Dowl. & Ryl. 603.

(b) 2 Barn. & Cressw. 232.

(c) 1 Dowl. & Ryl. 558.

(d) 9 ed. vol. i. 551.

(e) 2 Stra. 1081; S. C. Andrews, 53.

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duced, sworn the day before, of the party being alive and the debt unpaid, upon which the Court made the common rule. The Solicitor General (a) on another day, moved to discharge it on an affidavit that the defendant died on the day when the first motion was made, at seven o'clock in the morning, and insisted that this was by a surprise upon the Court; and on great debate the Court declared that if it had then appeared that the man was dead, they would not have made the rule, but they applied the maxim *fieri non debet, factum valet*, to this case, and compared it to the cases, *Salkeld*, 82 (b), and *Fuller v. Joselyn*, ante, 882 (c), and thus suffered the deceit that had been put upon the Court to prevail." The counsel (a) who had moved it appears to have been not very much pleased with this decision, and he was not very unjustly displeased. That seems to be the only authority against what has been done in the other cases;—that is the only case which stands in the way of the general rule that a warrant of attorney expires at the death of the party who gave it.

We think, therefore, that in this case, the judgment was improperly entered, and must be set aside.

(a) The Reporter himself.

Lord Holt, 401; 7 Mod. 93.

(b) Probably *Oades v. Woodward*, 1 Salk. 87, reported also 2 Ld. Raym. 766, 844; 3 Salk. 116;

(c) 2 Stra. 832; *Fuller v. Johnson*, Cas. temp. Hardw. 158; 2 Barn. K. B. 357, 358, 404.

The KING v. The Justices of the Town of CAMBRIDGE.

Whether parish officers have power to abandon a poor-rate after it has been allowed and published, *quare*.

F. GUNNING had obtained a rule, calling upon the justices of the town of Cambridge to shew cause why a mandamus should not issue, requiring them to hear and

When, after such allowance and publication, and notice of appeal by a party aggrieved, the parish officers give notice to the appellant of an abandonment of the rate, but refuse to pay his costs incurred up to that time, about the appeal, the sessions have jurisdiction over the appeal, if entered in pursuance of the notice; and are bound to quash it, if defective, for the reason assigned in the notice of appeal.

And if the sessions refuse to go into the appeal, the Court will compel them to do so by mandamus.

determine an appeal of *John Faulkner* against a poor rate made in July last by the overseers of St. Giles, Cambridge, and why they should not pay the costs of this application. This rule was obtained upon affidavits, which stated the following facts:

8 July last. A rate for the relief of the poor of the parish of St. Giles, Cambridge, was made, in which the appellant was rated at 6*l.* 14*s.* 3*d.* in respect of lands occupied by him.

4 July. This rate was duly allowed by two justices of the peace for the town of Cambridge, and the allowance was duly published on the following Sunday.

8 September. The appellant paid to the assistant overseer the amount in which he was rated.

Shortly afterwards the appellant obtained a copy of the rate, and upon examination found the rate unequal.

4 October. Notice was given in due form to the churchwardens and overseers, and to other persons interested, of the intention of *Faulkner* to enter and prosecute an appeal accordingly, which notice specified 32 grounds of appeal.

Counsel had been retained previously to the service of this notice.

7 October. A copy of the notice of appeal was lodged with the clerk of the peace of the town, at his office, and a subpoena ad testificandum obtained and issued on the part of the appellant.

9 October. A notice was served upon the appellant's attorney, by the attorney for the churchwardens and overseers, by which the churchwardens &c., after stating that they found that some of the objections specified were fatal, and that the rate could not be supported, and that the object of the notice was to save the appellant the expense of appealing at the sessions, gave notice that they had abandoned, and did thereby abandon the rate, and that the appellant might receive back his money; and further, that they did not intend to appear at the sessions to support or defend the rate.

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At the time of the service of this notice, the appellant's attorney stated that he considered the abandonment inoperative, and that he should be obliged to proceed with the appeal in the same manner as if it were resisted, unless the churchwardens &c. would consent to the rate being quashed and would pay the costs incurred by the appellant; and he proposed that this course should be adopted. The proposition was however rejected by the attorney for the churchwardens &c., who relied upon the abandonment of the rate, as an objection to the appeal being heard. The expenses necessary for the trial of the appeal were in consequence incurred by the appellant, and the appeal duly entered by the clerk of the peace at the next quarter sessions, which commenced 13 October. The appeal was then called on, but it was objected by counsel on behalf of the parish, that *the rate having been abandoned*, the Court had no *jurisdiction* to hear the appeal; and, (it appearing that notice of the abandonment had been given by the parish officers to the clerk of the peace,) the sessions after argument, decided that they had no jurisdiction to hear and determine the appeal, and refused to allow it to be gone into. It being contended that the appellant was entitled to go on with the appeal, in order that he might obtain his costs, justly incurred, the recorder stated, that if the Court had gone into the appeal, they would not under the circumstances have allowed the appellant his *costs*.

Sir J. Scarlett and W. H. Watson now shewed cause. The Court cannot grant a mandamus where no grievance exists. The party who applies for this mandamus has, by the abandonment of the rate and the return to him of the amount paid by him, obtained all that he sought by his appeal to obtain. The sessions had afterwards no jurisdiction, for by that abandonment the existence of the rate was put an end to. Parish officers may clearly abandon an *order of removal* made for their benefit;—*Rex v. Llanryddr (a)*, *Rex v. Did-*

(a) 1 Burr. S. C. 658.

delebury (a); and this is an analogous case. But supposing that the justices had jurisdiction, the only object which the appellant could have would be the hope of getting costs. It is however entirely in the discretion of the Court, whether they will grant costs, and the recorder has in this case stated that the Court would not have given costs to the appellant, if the appeal had been gone into. Therefore the refusing to proceed with the appeal could not constitute a grievance such as to entitle the appellant to a mandamus.

Whatever may be the fate of the other part of this rule, it must at all events be discharged as to so much as relates to the payment of the *costs* of this application.

Campbell, A. G. contra. The sessions ought to have quashed the rate. If they had done so and had refused to give costs, whether justly or not, the applicant would have had no locus standi. The justices dismissed the case upon the ground that they had been ousted of their jurisdiction by a supposed abandonment of the rate. Though the overseers may abandon an *order of removal*, they have no such power in the case of a rate. By 43 Eliz. c. 2, the rate is to be made by the overseers, and allowed by justices; and after such allowance, and publication, it cannot be abandoned or quashed, except by the sessions upon appeal. The rate once published is the affair of the *parish*, not of the overseers; and any one who is rated may defend the rate, and say that it shall not be abandoned: The abandonment of this rate by the overseers is therefore a mere nullity, and the rate might still be enforced. The continued existence of this rate, and the being deprived of his costs properly incurred, are grievances which entitle the applicant to this mandamus. By the reform act (b), a person who is rated to the relief of the poor, but has not paid all the rates up to a certain time, is disqualified from voting; and the effect of allowing this rate to

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(a) 12 East, 359.

(b) 2 Will. 4, c. 45, s. 27.

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continue to have a legal existence, would be to disqualify all those who had not paid the amount at which they are *by that rate* assessed. The sessions *had* jurisdiction, and *ex debito justitiæ* the applicant is entitled to this mandamus. The observation of the Recorder, that if the Court had had jurisdiction, they should not have given costs, was premature and extrajudicial, and moreover the refusing to allow the applicant his costs, would have been most unjust.—Here he was stopped by the Court.

Lord DENMAN C. J.—Most undoubtedly the Court had jurisdiction, and ought to have quashed the rate. Without deciding the general question as to the power of parish officers to abandon a rate, which they think they cannot support, that which was done in this case by the overseers was certainly at all events a *consent to quash*. The appellant had a right to have the opinion of the Court as to whether his costs should be allowed him. I do not see how it is possible to avoid making this rule absolute on account of *both* the grievances which have been mentioned.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

F. Gunning, (who was with *Campbell*, A. G.) having urged that the parish officers were substantially the defendants in this case, and that therefore the Court might make the rule absolute *with costs*.

The COURT held that they had no power to do so, and therefore

Rule absolute without costs.



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The KING v. WILLIAM WILSON.

UPON appeal by *Wilson*, an order of filiation made upon him by two magistrates of Suffolk, whereby he was adjudged to be the reputed father of a male bastard child, alleged in the order to have been born in *Hintlesham* of the body of *Caroline Grimwade*, single woman, on 23d July, 1831, was confirmed, subject to the following case :

In 1830, *Caroline Grimwade*, whilst in the service of *Wilson*, in the parish of Washbrook, Suffolk, became pregnant by him. By the persuasion of *Wilson*, and in order to avoid being called upon to swear the child of which she was pregnant to *Wilson*, she left Washbrook, and went to the parish of *Hintlesham*. She continued at *Hintlesham* until the morning of the day upon which she was delivered, 23d July, 1831, when she went, by the direction of *Wilson*, to lodgings which he had taken for her in an extra-parochial place in *Ipewich*, and for which he paid, and was there delivered of the child mentioned in the order; of which child *Wilson* was the father. For some time previously to and at the date of the order of filiation, she was receiving relief for herself and her children from *Hintlesham*, where she was living with them; of which parish she was, at the time of the birth of her child, and continued to be down to the period of the hearing of the appeal, a settled inhabitant.

The sessions found fraud in the conduct of *Wilson* throughout the transaction; and that, but for the fraudulent conduct of *Wilson*, the child mentioned in the order would have been born in *Hintlesham*; and that he fraudulently procured *Grimwade* to go to the extra-parochial place (to which, but for him, they found she would not have gone,) with a view to prevent an order of filiation being made

To give jurisdiction to magistrates to make an order of affiliation under 18 *Eliz.*, c. 3, s. 2, it is necessary that it should be for the relief of a parish in which the illegitimate child was born, and to which it is chargeable.

A fraudulent removal of an unmarried pregnant woman, settled in *A.*, to an extra-parochial place, by the putative father, does not make a birth in the extra-parochial place to be in contemplation of law a birth in *A.*, so as to entitle that parish to relief under 18 *Eliz.*, c. 3, s. 2.

So, where the removal is to another parish.

Where an order of affiliation, in which the birth of an illegitimate

child is alleged to have taken place in *A.*, is confirmed by an order of sessions, subject to a case in which the birth is stated to have occurred in *B.*, to which the putative father had fraudulently removed the mother, who was settled in *A.*;—the order is bad, on the ground (*inter alia*) that it contains a recital of a false fact.

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upon him, and to throw the burthen of the maintenance of the child upon Hintlesham.

Sir *J. Scarlett, Andrews*, and *Prendergast*, in support of the order of sessions. By 6 *Geo. 2*, c. 31, s. 1,—if any single woman shall be delivered of a bastard child, which shall be chargeable or likely to become chargeable to any parish or extra-parochial place, justices are authorized, upon application made by the overseers of the poor of such parish, or by any one of them, or by any substantial householder of such extra-parochial place, to issue their warrant to apprehend the putative father, and to commit him to prison, unless he give security to indemnify the parish. The words of the statute do not confine the application to the officers of the parish in which the child is *born*; but gives the magistrates jurisdiction upon the application of the overseers of any parish to which the child is *chargeable or likely to become chargeable*. The child could not, during the period of nurture, be separated from its mother; and therefore it was chargeable to Hintlesham, the parish in which the mother was settled.

The order of sessions may also be supported, upon the principle, that the law will not permit a party to take advantage of his own fraud, and that the Court will presume, (against the fact,) that the child was born in that parish in which it would have been born, had it not been for the fraud of the party charged by the order. [Lord *Denman*, C. J. Is there any authority that the Court will presume against the facts which actually occurred?] *Tewkesbury v. Twining* (a) and *Masters v. Child* (b) are authorities to that effect. In both those cases, the settlement of the child was held to be in the parish from which the mother was fraudulently removed. In those cases, and in *Rex v. St. Nicholas, Leicester* (c), and *Rex v. Mattersey* (d),

(a) *Bulstr.* 349.

(b) 3 *Salk.* 66.

(c) 2 *Barn. & Cressw.* 891.

(d) *Ante*, i. 49.

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it is laid down as clear law, that the mother of an illegitimate child, who is, by the fraud or collusion of the officers of the parish in which she is legally settled, removed out of her own parish into another, with a view to her being delivered in such other parish, is, in law, supposed to have been in the place of her settlement at the time of the birth of her child, although the fact is otherwise. [*Taunton, J.* In this case no fraud is alleged to have been committed by the *parish officers*.] The case of *Rex v. Mattersey (a)* (in which it was held that a fraudulent removal by *private individuals*, made with a view to discharge the parish, does not make the parish from which the woman is removed chargeable,) does not govern this case; because there the *question was between the two parishes*. That case, as well as the others which have been referred to, establishes that fraud, as between two parishes, shall not have the effect of preventing the settlement of an illegitimate child from being in that parish in which, but for the fraud, it would have been born. The same rule ought to apply in a case such as this, in which the question is *between the parish and an individual*, and in which by the *fraud* of that *individual* a burthen is attempted to be thrown upon the *parish*. The parish of Hintlesham has been put to as much expense as if the child had been actually born there. If the Court will not permit *the parish* to commit a fraud, neither ought they to permit the fraud of *an individual* to succeed. [*Patteson, J.* It is alleged in the order, that the child was born in the parish of Hintlesham. How can it be said that the child was born in that parish, when in truth it was born in an extra-parochial place? I do not see how the Court can consider the child as born in the parish for one purpose, viz., to support the order, and in an extra-parochial place for another purpose, viz., its settlement.] The law will assume that the child was born in the parish of Hintlesham, so far as *Wilson* is concerned. The principle of the decisions in *Tewkes-*

(a) *Ante*, i. 49.

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bury v. Twining (a) and *Masters v. Child* (b) is, that a parish is estopped from shewing the real birth-place of the child when, but for the fraud of its own officers, that birth-place would have been within its own limits. For the same reason, *Wilson* should be estopped in this case. [*Taxton, J.* An *estoppel* can never arise out of circumstances of fraud. Lord *Denman, C. J.* The order states that the child was born in Hintlesham; and although the Court of Quarter Sessions confirm the order, yet they find that the child was *not* born in Hintlesham. No case has as yet decided that the Court will presume a fact which is expressly found not to be true.] It might have been objected, in *Teokesbury v. Twining*, that the child was born in one parish, and presumed by this Court to be born in another. This order is made on the 18th *Eliz. c. 3*, which is a *remedial* statute; and in *Westbury v. Coston* (c) the Court construed that statute, as they do all remedial statutes, *liberally*. This is a case clearly within the mischief intended to be remedied by the statute.

Austin, contra. The 18 *Eliz.* is the only statute which authorizes the making of an order of affiliation. If the language and intention of 49 *Geo. 3, c. 68*, (which repealed and re-enacted 6 *Geo. 2, c. 31*.) be examined, it will be found that it was intended only to *superadd* a provision to the statute of *Eliz.* The 49 *Geo. 3* provides therefore that the justices may issue their warrant, and commit the putative father to prison in case he does not give security to indemnify the parish. In the 6th *Geo. 2* and 49th *Geo. 3*, the words "birth" and "delivery" are used in conjunction with the word "chargeable;" and it is only where the child is born in a parish, and *by reason of its birth there* becomes chargeable, that the justices have jurisdiction. If the object of the 6th *Geo. 2* and 49th *Geo. 3* was simply to add a provision to the 18th *Eliz.*, the only question is, what power

(a) *Suprà*, 244.

(c) 2 *Salk.* 532.

(b) *Suprà*, 244.

is given by the 18th of *Eliz.*? That statute only gives the magistrates jurisdiction for the relief of the parish where the child is *born*. To construe that statute so as to extend it to a case like this, would be contrary to *Rex v. Willey* (a) and all the cases decided upon this subject subsequently to that case. If this order is valid, any parish to which the child may hereafter become chargeable, may obtain another order of affiliation.

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Then, can there be a constructive birth in Hintlesham? It has been shewn that the statute of *Eliz.* gave the remedy to the parish where the child was born. It is established, beyond controversy, that a bastard is settled where born. A party cannot have two settlements; yet the argument on the other side assumes that the child is settled at Hintlesham by construction and also where it was in fact born. The parish where the child was born is the only parish ultimately burthened, and is therefore the only parish to be indemnified: *Regina v. Cash* (b). It is quite clear that the child was not chargeable to Hintlesham as casual poor. If the child had been born in a third parish, and not in an extra-parochial place, this order could not have been supported. What difference can there be between a case in which the birth is in a third parish, and one in which it happens in an extra-parochial place? Nor is there in truth any hardship in this case, since, by 49 *Geo. 3*, two householders of an extra-parochial place, where a bastard is born, may apply for an order in the same manner as the overseers of a parish.

Byles, on the same side, was stopped by the Court.

LORD DENMAN, C. J.—The order of bastardy in this case states that the child was born *within the parish of Hintlesham*; and the justices at sessions have confirmed that order. But they have stated facts in a special case;

(a) 1 Bott. 586. 5 ed. 499. (b) 1 Burn Just. 367, 24th ed. 324.

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and one of those facts is, that the child was *not* born within the parish of Hintlesham, but in an extra-parochial place in Ipswich.

It is argued that although the child was not in reality born within the parish, yet the sessions have found another fact which is equivalent to the fact of its being born there, viz., that the mother was removed, by a *fraud* of the father, from the parish in which the child otherwise would have been born, to an extra-parochial place; and it is argued, that as, as between parishes, where a fraudulent removal has taken place by the act of the parish officers from one to the other, the child has been held to be settled where it would, but for the act of fraud, have been born; so, as against this individual, the child may be held to have been born in the parish in which it would have been born but for the fraud of the individual. I adhere to what fell from the Court in *Rex v. Mattersey*; but I think that the doctrine is not to be extended. It was admitted in the argument that the question is, whether the child can be presumed to have been born within the parish of Hintlesham, and whether we can possibly uphold an order which states that fact,—the justices at the same time stating another fact which negatives it. I cannot conceive that any desire, even to defeat fraud, can warrant such a proceeding. Though we may lament that any person should derive benefit from fraud, and though many cases may be put in which a person cannot be allowed in a court of justice to allege his own fraud, yet where the Court cannot defeat the fraud except through the medium of an untruth, they cannot defeat it at all.

Another argument is, that under 6 *Geo. 2*, c. 31, a bastard child, though not born within a parish, may be chargeable to that parish, and may therefore be the proper subject of an order made upon the father; but when that statute comes to be accurately examined, it is quite plain that such a consequence cannot ensue. By the 6th *Geo. 2*, power is given, where a child is likely to be born a bastard and to be chargeable to any parish or extra-parochial place, to the

justices to make a preliminary inquiry, and then issue a warrant to apprehend the father, who shall be bound over to obey such order as may be made at the sessions. Then, what order is here referred to? It is an order to be made in pursuance of the act of the 18th of *Eliz.* By the 18th *Eliz.* two justices have power to take order "as well for the punishment of the mother and father of *such bastard child*, as also for the better relief of every *such parish*;" and upon reference to the introductory words of the section, it will be seen that the enactment relates only to bastards "*left to be kept at the charge of the parish where they be born.*" The jurisdiction given to the justices by these two statutes appears, therefore, to be confined to the making of orders for the maintenance of illegitimate children for the relief of the parishes *in which the children are born.* It seems to me, therefore, that the argument which has been advanced in favour of the order of sessions *fails*, and that we are bound to quash it.

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TAUNTON, J.—I give no opinion on the question whether, under the very special circumstances in the present case, the parish of Hintlesham might not have entitled itself to relief as against the appellant. That question, I think, is encircled by a great many difficulties. My present impression is, that the parish of Hintlesham could in no way have entitled itself to relief. The ground upon which my opinion, that the order of sessions ought to be quashed, is founded, is, that it is recited in the order that the justices have adjudged that this child was born in the parish of Hintlesham; which, as appears from the case, is a recital of a *false fact*. It may have been born (about which I say nothing) under circumstances which rendered it the same in point of law as if it had been born within the parish; but that, I think, does not justify the sessions in turning a constructive birth into an actual birth. If the justices had stated the special facts, and drawn a conclusion, that though

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born in an extra-parochial place, it was equivalent to a birth in Hintlesham—whether that would have varied the case or not, I will not give any opinion. I am clearly of opinion that the sessions were not justified, under the circumstances, in saying that the bastard was born within the parish of Hintlesham, though perhaps in legal effect it might have the same operation.

PATTESON, J.—I am also of opinion in this case that the order cannot be supported, as well on the ground stated by my brother *Taunton*, as upon that on which it is put by my lord. I was at one time very much struck with the language of 6 *Geo. 2*, c. 31. It seemed to me, at first view, that by the general words of the first part of the section, the magistrates had jurisdiction, if the bastard was *chargeable* to any particular parish. It appears to me, however, to come entirely to the question as to the supposed constructive birth in Hintlesham; for, upon examination of the act of 18th *Eliz.*, I think that the child must be both *born in*, and chargeable to, the parish for whose relief the order is made. Although some of the older cases have determined that where fraud is committed by the officers of the parish, the child shall be considered as born in the parish guilty of the fraud, yet *Rex v. Mattersey* has determined that this consequence shall not follow from the fraud of an *individual*. The child therefore is not *settled* in *Hintlesham*. It was urged that this was immaterial, for that, *as against the father*, it might, nevertheless, be taken to be so. But though it is a principle that a man shall not take advantage of his own fraud, yet I do not see how we can say that for *this* purpose the child is to be considered as born in Hintlesham, without involving the consequence that the child must have been born there for *all* purposes.

WILLIAMS, J.—The argument founded on the statute of *Geo. 2*, seems, upon examination, to fail; and that being so, I think that *Rex v. Mattersey* (which is a recent deci-

tion) goes a very great length in shewing that intendment of law, or a *constructive* birth by reason of the fraud of the father, cannot prevail. Upon the whole, and particularly upon the authority of that case, I think that the order cannot be sustained.

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Order of sessions quashed.

REX v. SAMUEL FRANCIS.

SIR *James Scarlett* had obtained a rule for a criminal information against the defendant, for a libel upon *Peter Rigby Wason Esq. M. P.*, in a newspaper published at Liverpool by the defendant.—The affidavit upon which the rule was obtained described the paper as published by "*Samuel Francis, Union Buildings, John Street, Liverpool.*" The affidavit (a) as sworn at the Stamp Office, as appeared by the certified copy of it (b), described the paper as published by "*Samuel Francis, Union Street, Castle Street, Liverpool.*" The rule had been twice enlarged.

The Court will discharge a rule for a criminal information for a libel against the publisher of a newspaper, where in the affidavits upon which the rule had been obtained, and the affidavit sworn at the stamp office, the defendant was described as of different places.

F. Pollock, with whom was *F. Kelly*, on showing cause, objected that the affidavits did not connect the defendant with the newspaper so as to charge him with the publication of it.

So although the rule had been twice enlarged—and the suitor apply to have the rule again enlarged, that he may have an opportunity of amending his affidavit.

Sir *J. Scarlett* and *Follett* contended, that as the rule had been twice enlarged, the objection now came too late, and they requested, that if the Court should be of opinion that the objection ought to prevail, the rule might be again enlarged, in order that the parties might have an opportunity of amending the affidavits.

Lord DENMAN, C. J.—I am of opinion that the defend-

(a) Required by 38 Geo. 3, c. 78, s. 1. (b) Made evidence by sect. 9.

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ant is entitled to have this rule discharged. My decided opinion is, that where an individual calls on the Court for its *summary* interference, he must come prepared in the first instance. The act of parliament (*a*) gives an easy process for bringing the defendant before the Court (*b*), and a party who seeks to avail himself of the provisions of that act should proceed strictly under it.

The other Judges concurring,

Rule discharged (*c*).

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| (<i>a</i>) 38 Geo. 3, c. 78. | Campb. 99; <i>Rex v. Amphit</i> , 6 |
| (<i>b</i>) <i>Vide</i> sect. 9, 14, 17. | Dowl. & Ryl. 125; 4 Barn. & |
| (<i>c</i>) And see <i>Rex v. Hart and</i> | Cress. 35; <i>Mayne v. Fletcher</i> , 4 |
| <i>White</i> , 10 East, 94; <i>Rex v. Hunt</i> | Mann. & Ryl. 311; 9 Barn. & |
| 2 Campb. 583; <i>Rex v. White</i> , 3 | Cress. 382. |

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The KING v. The Rector, Vestrymen, and Parishioners of
the Parish of ST. JAMES, WESTMINSTER.


Where by a local act of parliament, power is given to two justices to relieve an applicant aggrieved by a poor-rate, they have power to relieve in an individual case, by reducing the amount in which the party was as-

BY a local act (2 Geo. 3, c. 57), "for the better relief and employment of the poor (and for other purposes) in the parish of St. James, within the liberty of Westminster," the rector, vestrymen, churchwardens, and overseers are authorized to make rates for the relief of the poor, and for other parochial purposes. By the 16th section, it is provided as follows: "That if any person shall find himself aggrieved by any such rates or assessments, he shall *first apply to any two justices* of the peace for the said city and liberty of Westminster, residing in or near to the

party was assessed, although the ground upon which they consider him entitled to relief is that the whole rate is made according to an *erroneous principle*,

By a local act it is provided that if any person shall find himself aggrieved by any rate made under the authority of that act, he shall *first apply to two justices*, and if *not relieved*, he shall be obliged to pay such rate and may appeal to the Quarter Sessions: Held, that a power in the two justices to *relieve* upon application made to them, is necessarily implied.

said parish, and if not relieved, shall be obliged to pay such rates or assessments, and then, upon an appeal to the general quarter sessions of the peace to be held for the said city and liberty, next after the payment of such rates or assessments respectively, it shall be lawful for the justices of the peace, or the greater number of them, in such quarter sessions assembled, to cause so much money to be returned to such person who shall appeal as aforesaid, as shall appear to the said justices to have been overpaid by such person to the said rates or assessments, and to make such order therein as to them shall seem meet; which order shall be final and conclusive to all the parties."

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Under the authority given to them by this act, the rector, vestrymen, &c., on 27th April, 1833, made a general rate for the relief of the poor, upon a new principle, adopted on this occasion for the first time. According to this principle, the earl of *Burlington* was rated at 441*l.* 9*s.* on the sum of 2943*l.*, which was estimated as the yearly value of his lordship's premises in Piccadilly (a). The earl refused to pay this rate, and gave notice that he should appeal against it. Accordingly, at a meeting of justices held on 22nd July, 1833, the earl applied to the two justices then present, for relief against the rate, by which he considered himself aggrieved, and which, it was contended on his part, was made upon an erroneous principle. It was objected, on behalf of the rector, &c., that the justices had no jurisdiction to enquire into the principle upon which a rate was made, but could only relieve where an admitted principle was applied unequally. The justices, however, called upon the rector, &c. to explain the principle upon which the assessment had been made, which was accordingly done, and they decided that such principle was erroneous. Upon another principle, (which they stated to be the only correct principle of rating,) the justices, after viewing the premises, and hearing the evidence of surveyors, decided that the estimate of the value of the earl's

(a) Burlington House.

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property ought to be reduced from 2943*l.* to 1650*l.*; and they made an order that the earl should be relieved by reducing the estimate accordingly. The evidence on either side was given by witnesses who were not upon oath. Upon affidavits stating the above facts, *W. Clarkson* obtained a writ of *certiorari* to the two justices, directing them to send to this Court the order above mentioned. The order returned by the justices, was, *upon the face of it*, perfectly good. Upon other affidavits, stating, in effect, the same facts as are above set out, *W. Clarkson*, in last Hilary term, obtained a rule to shew cause why the order should not be quashed for insufficiency.

Sir *James Scarlett* and *F. N. Rogers* now shewed cause. There is no ground for making this rule absolute, unless it can be shewn that the two justices had no jurisdiction. Upon the face of the order, it appears perfectly good, unless it can be shewn that the magistrates had no power to relieve at all in such a case. It is a most unusual course to file affidavits where an order is brought up by *certiorari*, for the purpose of shewing that the decision of the justices proceeded upon an erroneous ground. The objection, which is stated upon the affidavits, is that the magistrates have refused to recognize the new mode of rating which the parish have adopted. Whether the principle of that mode of rating be correct or not, cannot be questioned here. [Lord *Denman*, C. J. I certainly do not see what we have to do with the *principle* of rating. *Campbell*, A. G. admitted that he could not ask the Court whether the principle was correct or not, but that the only question was whether, admitting that the principle of the rate was erroneous, the justices had power under the act to do that which they had done.] In *Rex v. Cheshunt* (a), a party having appealed against a poor-rate on the ground that he was over-rated, the sessions amended the rate by inserting a less sum. Upon motion to quash

(a) 2 T. R. 623.

the order of sessions, it was contended that the sessions had no authority to *amend* the rate, but should have *quashed* it. The Court, however, held that the sessions had acted properly in amending the rate, and that they had authority to do so, for that the 17 Geo. 2, c. 38, s. 6, would be nugatory if it did not extend to such a case. So here, if the justices had not power to amend the rate by inserting a less sum, the 2 Geo. 3, c. 58, would be nugatory. That act directs that a party who finds himself aggrieved by a rate shall *first apply to two justices*, and *if not relieved*, shall be obliged to pay such rate; and then, upon appeal to the general quarter sessions for the city and liberty, the justices at sessions are empowered to cause so much money as may appear to have been *over-paid* by the appellant to be returned to him. It is clear that the legislature intended that the two justices should have power to *relieve* by *reducing the rate*, although that power is not *expressly* given to them: otherwise, why should a party be directed to apply to the two justices, and why should the appeal to the quarter sessions be given only where the justices *do not relieve*? The power to *relieve* must necessarily be implied from the language of the enactment.

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Campbell, A. G. and W. Clarkson, contra. Although an order of justices be good upon the face of it, yet if it be *shewn* by affidavit that the justices have exceeded their jurisdiction, the Court will relieve the subject by quashing the order. [*Taunton, J.* It certainly has been the practice to try upon affidavits whether justices have exceeded their jurisdiction.] It was so held in *Rex v. Justices of Somersetshire* (a), (where affidavits to shew that the justices had exceeded their jurisdiction were admitted), and in *Rex v. The Justices of the North Riding of Yorkshire* (b). The justices have in this case *exceeded their jurisdiction*. The

(a) 8 Dowl. & Ryl. 733; 5 Barnw. & Cressw. 816.

(b) 9 Dowl. & Ryl. 204; 6 Barnw. & Cressw. 152.

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act (supposing that it gives them *any* power) gives them no authority to do more than the *sessions* could have done; yet in this case they have done that which the *sessions* could not have done, since they have amended a rate in an *individual* case, on the ground of a defect in the *principle* of the *whole* rule. The quarter sessions have by this act power to make such order as to them may seem meet, and consequently they have power to *quash* the rate; but it is well established that where a rate is *bad in principle*, the only mode of affording relief is by *quashing* the rate *in toto*; and the reason is obvious, for otherwise relief would be afforded to an individual appellant at the expense of the remainder of the parish. For the purposes of the argument on the rate, it might be admitted that the principle of the rate is quite indefensible. [*Taunton, J.* If the justices have power to *reduce* the rate whenever they see that the party applying to them has been rated in too large an amount, I do not see that the *medium* through which they arrive at that conclusion can make any difference.] The act only gives, at the most, a *qualified* power to relieve. The justices can only relieve where the sessions could do so; and the sessions can relieve an *individual*, only where, *according to an admitted principle*, he is rated in too high an amount. [*Taunton, J.* I believe that the sessions may in *any* case *reduce* the amount in which the appellant is rated, if they think he is rated too high; no matter through what medium they arrive at that conclusion.] It is submitted, upon the authority of *Rex v. Swannage* (a), that the only legal mode of disposing of a rate which is bad in *principle* is by quashing it altogether, and that the two justices, by declaring that the rate was bad in principle, put it out of their *power* to relieve the applicant. The magistrates have in reality done *more* than quash the rate; for, by adopting another principle, and altering the assessments in accordance with it, they

(a) 2 Dougl. 562.

have quashed the old rate as to those individuals who have appealed, and substituted a new one of their own. In *Nolan's Poor Laws* (a), it is said, "The true principle to regulate the amendment, or quashing of rates (as far as it can be laid down in the abstract, where a good deal must depend upon the peculiar circumstances of each case) seems to be, whether the amendments sought to be introduced are such as must essentially alter its proportion or character, so as rather to make it a new, than an amended rate. If they cannot have this effect, the magistrates should amend; but otherwise, as they are expressly prohibited from making a *new* rate, they ought to quash;" and then the author puts instances in which the magistrates ought to quash the rate, and amongst them is this—when the ground of complaint is "that the rate is made upon a principle altogether erroneous." If relief is given in individual cases, on the ground that the rate is bad in principle, the whole of the rest of the parish is thrown into confusion.

But it is very doubtful whether, under the 16th section of this act, the two justices have *any* power to relieve. The only words from which it can be implied that the justices have *jurisdiction* are "and if not relieved," &c. and these, it is submitted, are not sufficient to warrant the implication, that the two justices have *power* to relieve the rated individuals, and that too without examination of witnesses upon *oath*. There is no authority given to them to administer any oath. None was administered in this case. The fact of there being no reciprocal benefit given by the act to the *parish*, is a strong argument against implying that the justices have power to relieve individual rate-payers.

Lord DENMAN, C. J.—The 16th section of this act is a very extraordinary enactment, and we should recommend the parish to apply for a new act. I certainly find great difficulty in implying *any* power whatever in the two jus-

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(a) 2 Nolan, 555, 4th edition.

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tices to make an order interfering with the acts of the parish officers. But it seems to be conceded that they have *some* power. Then what is the power which they have? Only to give relief to an individual applying to them, if he appears to be rated too high. It seems that the justices thought that the principle of the rate was erroneous, and that they reduced the assessment upon the Earl of *Burlington*, because he was rated at a higher amount than he would have been, if the rate had been made upon that which they considered the correct principle of rating. I cannot say, that, because the justices thought that the rate *generally* ought to have been different, therefore they ought not to have afforded relief in an individual case. It does not appear here that any other person was aggrieved by reason of the adoption of the new principle:—But this I think not material. The justices are to say whether the assessment upon the individual is too high or not; and if they think that it is so, it can make no difference whether the ground upon which they come to that conclusion does or does not apply to other ratings also.

TAUNTON, J.—There is much force in the argument that the two justices have not *any* power, for the act is very ill worded; but I still think that a power to relieve vested in the two justices is necessarily implied. Upon the other point I entirely agree with my lord.

PATTESON, J.—I entirely concur, though I confess I have great difficulty in putting a sensible construction upon this enactment. The legislature must have intended that the justices should have power to relieve a party applying to them under this section; and inasmuch as a party aggrieved cannot go to the sessions without first applying to the two magistrates, they must have authority to deal with *any* complaint against the rate. That the magistrates should have no power to examine upon oath, is most extraordinary; but that being so, I think that they

have acted very properly in abstaining from the administering of any oath to the witnesses examined by them.

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WILLIAMS, J.—If the appeal to the sessions had not been clogged by the preliminary application to the two justices, we might have said that the vagueness of the language of the act was a sufficient objection to their jurisdiction; but inasmuch as the complainant cannot reach the sessions unless he has failed to obtain relief from the two magistrates, it must necessarily be implied that they have power to relieve, if, upon hearing the application, they think fit to do so.

Rule discharged.

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Same v. PENGELLY.

Same v. ROSKRUGE.

Same v. CONN.

Same v. NICHOLLS.

THESE actions of ejectment were commenced by declarations framed as in proceedings *by bill*, and were brought to recover several estates in the county of Cornwall.

On the 6th of March last, declarations were served on the defendants with notice to appear on the first day of Easter term then next.


19 April. Judgment against the casual ejector was moved for; and the Court ordered that unless the tenant in possession should appear and plead to issue on Monday, next after the end of the term, judgment should be entered against the casual ejector.

plaintiff as for want of a plea, and writs of possession were sued out and executed. The defendant had left a plea at the judge's chambers. The defendant obtained a judge's order to set aside the judgment and writs of possession, and commanding the sheriff to restore the possession. Held, the order ought not to have been made on the sheriff, and that writs of restitution issued upon the order were irregular.

Whether it is a valid objection to a writ of restitution, that no *præcipe* had been issued, or that the writs themselves were only sealed and not signed, *quære*.

The rule of H. 4 Will. 4, requiring pleadings subsequent to the declaration to be delivered between the parties, does not apply to actions of ejectment, which are left to the old practice.

In ejectment judgment was signed by the

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The time for appearing having expired on the 12th of May, the plaintiff's attorney on the following day searched at the *Filacer's* Office (a) for an appearance, but found none. He therefore filed an appearance according to the statute, and in the evening of that day signed judgment in all the actions as for want of a plea.

The defendants' attorneys had, on the 12th May, filed common bail, and left pleas in each of the above actions at the chambers of the Lord Chief Justice, but had not delivered them to the plaintiff's attorney. This was done under the supposition that the rule of H. 4 *Will.* 4 (b), "that no demurrer or any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties," did not apply to actions of ejectment.

Writs of habere facias possessionem issued, under which the lessor of the plaintiff was put into possession.

28th May. The defendants obtained a summons from the Lord Chief Justice, calling upon the lessor of the plaintiff to shew cause why the judgments signed, and the writs of possession issued, in these actions, should not be set aside for irregularity, and *why the sheriff should not restore possession of the premises.*

30th May. Cause was shewn before *Patteson, J.*, who was of opinion, that the rule of Hilary term, 4 *Will.* 4, did not apply to actions of ejectment, and thereupon signed an order in the form above-mentioned. When the order arrived in Cornwall, the sheriff having put the lessor of the plaintiff in possession, had quitted the premises; and as the lessor of the plaintiff refused to restore possession voluntarily, the sheriff did not think himself warranted under the judge's order in using force.

12th June. The order being shewn to the sealer of the writs, he considered it to be a sufficient authority for issu-

(a) The declarations being in the form of declarations by bill, it would appear that the search should have been at the Common Bail Office.
 (b) *Ante*, vol. iii. 13.

ing writs of restitution, and sealed and issued such writs accordingly in each of the actions. No præcipe was made out for these writs of restitution, nor were they signed.

On the same day, but after the issuing of the writs, the order was made a rule of Court.

In the early part of this term, *Stephen*, Serjt. obtained a rule calling upon the defendants to shew cause why the above order and rule should not be set aside,—and why the writs of restitution should not be set aside for irregularity,—and why the tenant or tenants in possession should not restore the possession to the lessor of the plaintiff.

Follett and *Smirke* now shewed cause.

I. One objection to the writs of restitution is, that there was no authority for the issuing of them. There was the order of *Patteson*, J. [*Patteson*, J. It was said that there must be a *rule of Court* to authorize the issuing of a writ of restitution.] A rule of Court was not taken to the officer, but the order was taken to him, and that order was subsequently, and on the same day, made a rule of Court. Another objection is, that there should have been a præcipe, and that the writs of restitution should have been signed as well as sealed. A præcipe was not necessary. It is a mere note of instruction to the officer, and has on more than one occasion been called “a worthless paper,” the want of which can be no objection to the writ (*a*). Nor is it necessary to sign a writ of restitution; for it is in the nature of a writ of execution, and by the late rule H. T. 2 Will. 4, s. 75, it is no longer necessary that such writs should be signed.

II. Judgment was improperly signed. The understanding and practice of the profession is, that it is not necessary to deliver the pleadings in ejectment; and it is distinctly sworn that since the promulgation of the rules of H. T. 4 Will. 4, the pleas have been left at the judge's chambers

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Filing pleas.

(e) See *Boyd v. Durand*, 2 Taunt. 164; *Usborne v. Pennell*, 10 Bingh. 531, 4 Moore & Scott, 431.

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as heretofore. The declaration in ejectment is mere *process* to bring the party into Court; and the action is a creature of the Court, which could scarcely have been intended to be within the above rule. The rule is, "that no pleading subsequent to the declaration shall be *filed* with any officer of the Court, but shall always be *delivered* between the parties." It therefore applies only to pleas which used to be *filed* with the clerk of the papers, or other officer of the Court, whereas pleas in ejectment never were filed with any officer, nor in fact filed at all, but merely left, with the consent rule, at the chambers of the judge. By the practice of the Court the plea is annexed to the consent rule, the latter of which is signed by the judge before it is taken away by the party. So that there is a good reason why the old practice should continue in actions of ejectment, which are in so many respects *sui generis* and unlike other actions.


Stephen, Serjt. in support of the rule.

Second point.

I. The judgment was properly entered up. The rule of Hilary term, which directs pleadings subsequent to the declaration to be delivered, applies to actions of ejectment.

There is no sound reason for holding that the rule, requiring that the pleadings subsequent to the declaration should be delivered between the parties, is confined to those pleadings which used formerly to be filed. It has been decided in the Exchequer, that certain of the late rules do not apply to ejectment; but that is on the ground that *those* rules were made on the authority of an act of parliament, which relates to *personal* actions only. [*Taunton*, J. The rule in question was not made under the authority of any *act of parliament*. It was decided in Easter term last that this rule does not apply to a plea in ejectment. I see that I have written this note to my copy of the rules, "Easter, 1834. These rules do not apply to actions of ejectment, the pleadings in which it has been usual to leave at the judge's chambers."] The rule is sufficiently general and comprehensive in its terms to include ejectments. If it

had been intended that the action of ejectment should not be included, it would have been expressly *excepted*. There are certain of those rules which indisputably do apply to ejectment; *e.g.* rule 18 (*a*). Can it then be said that the action of ejectment is included in these rules for some purposes and not for others?

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II. Then as to the writs of the restitution; they can only be made against the parties to the record, *Rex v. Leaver* (*b*). The order of *Patteson, J.* does not direct that the *lessor of the plaintiff* shall restore the possession, but that the *sheriff* shall restore the possession. Writs of restitution must be made by order of *Court* (*c*). The order of *Patteson, J.* is not equivalent to an order of Court for a writ of restitution. Unless it can be contended that writs of restitution are the ordinary course of proceeding, it is not within the jurisdiction of a judge at chambers to make an order for a writ of restitution. The writs are also irregular by reason of their having been sued out without a *præcipe*, and without having been *signed*. First point.

LORD DENMAN, C. J.—We think that the judgment is irregular, but that the order and writ of restitution are wrong. The order should have been on the party, and not on the sheriff.

TAUNTON, J. concurred.

PATTESON, J.—The rule will be absolute to set aside the writs of restitution, and so much of the order made by me as directs the *sheriff* to give possession. The rest of the rule will be discharged (*d*).

Rule accordingly (*e*).

(*a*) *Aule*, vol. iii. 16.

(*b*) 2 Salk. 587.

(*c*) *Anon.* 2 Salk. 588.

(*d*) *Williams, J.*, was sitting in the Outer Court.

(*e*) On setting aside a judgment

against the casual ejector, after a writ of *habere facias possessionem* has been executed, the proper course is said to be,—to obtain an order directing the *lessor of the plaintiff* to restore the possession,

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and on service of the rule made in pursuance of the order, and a refusal by the party to restore, to apply for an attachment for contempt. *Anon.* 2 Salk. 588, per Holt, C. J. *Davies* d. *Povey* v. *Doe*, 2 W. Bla. 892. Where the

rule has become ineffectual, by reason of the lessor of the plaintiff not being found to be served with it, the Court has granted a writ of restitution, *Goodright* d. *Russell* v. *Noright*, Barnes, 178.

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Where a licence to use certain patent machines is granted by indenture, in which it is recited that the grantor *has invented* the machines, and has obtained letters patent for the sole use of the invention, and inrolled the specification,—parties (and privies) to the deed are estopped from pleading either that the invention is not a *new* invention, or that the grantor was not the *first* inventor, or that no specification was inrolled.

Whether in covenant by the patentee of an invention, brought to recover rent

reserved in respect of a licence to use the invention, a plea merely alleging that the invention was not new, or that the plaintiff was not the first inventor, without shewing that the defendant had in consequence failed to have the exclusive enjoyment covenanted for, is a good plea by analogy to a plea of *eviction, quære*.

COVENANT. The declaration stated, that by a certain indenture made between the plaintiff of the one part, and the defendants of the other part, sealed with their respective seals, (profert) after *reciting* that the plaintiff *had invented* certain improvements in the construction of looms for weaving, commonly termed “power-looms,” and had *obtained his majesty’s letters patent*, containing a grant to the plaintiff, his executors, administrators, and assigns, of the sole use, benefit, and advantage of the said invention, with full power to vend the same for a certain term of years (usual in such cases), and that the *plaintiff had by an instrument in writing under his hand and seal, described and ascertained the nature of the said invention, and the manner of performance, and had caused such instrument to be inrolled agreeably to the terms and conditions of the letters patent, and that the plaintiff had agreed &c.,—the plaintiff in consideration, &c. covenanted with the defendants, that he would permit and suffer the defendants to use and have the benefit and advantage of the said invention, and the said letters patent, in manner therein specified, and stated in the declaration. The declaration then set out covenants on the part of the defendants, upon which breaches were assigned.*

The defendants (after setting out the letters patent upon oyer,) pleaded, first, that the supposed invention in the

declaration and letters patent mentioned, was not nor is a new invention; secondly, that the plaintiff was not nor is the first or true inventor of the improvements in the construction of looms mentioned in the indenture, and in the letters patent; thirdly, that the plaintiff did not within six calendar months next after the date of the letters patent, or at any time, cause an instrument in writing particularly describing and ascertaining the nature of his said invention, and in what manner the same is to be performed, to be enrolled in Chancery as required by the said letters patent, whereby the letters patent became, and at the time of the making of the indenture, were, void and determined (a).

General demurrer (b), and joinder.

Tomlinson in support of the demurrers. These pleas are bad, as containing a denial of that which the defendant has admitted under seal. Upon the first two pleas the only possible question that can arise, is, whether the recital that the plaintiff *invented* the improvements, amounts to an admission that the *invention was new*, and that the plaintiff was *the first and true inventor*. That it *does* amount to such an admission cannot well be doubted. The parties must have intended to use the word "*invented*" in its ordinary and popular sense; and according to that sense, the defendant must be taken to have acknowledged that the improvements were *newly found out by the plaintiff*. Upon the third plea there is not the slightest difficulty, as it contains a distinct denial of a distinct admission. The only question then is, whether (fraud not being pleaded) the defendant is estopped by the recital in the deed; and upon this point *Co. Lit.* 352 a, and *Comyns's Dig. Estoppel* A. 2, and the cases there collected (c), appear to be conclusive authorities.

(a) There were other pleas upon which issues of fact were raised.

(b) The ground of demurrer stated in the margin of the demurrer books was,—that the de-

fendants were estopped by the indenture, executed by them, from pleading the matters contained in their pleas.

(c) *Et vide ante*, 25 n.

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The case of *Hayne v. Maltby* (a),—in which pleas in bar, that the invention was not new, and that the patentee was not the inventor, were held good pleas to an action of covenant upon articles of agreement, by which the plaintiff had granted a licence to use certain machinery,—will be relied on *contra*. But the recital in that case was very different. The recital *there* was only that the plaintiffs were “*the assignees of T. Taylor of a patent for an engine;*” and therefore that case, supposing it well decided, can be no authority in favour of the pleas in *this* case. The doctrine of estoppel was clearly inapplicable, as there was no admission by the defendant that either the plaintiffs or *Taylor* (whose assignees they asserted themselves to be) had *invented*. Nor was it even recited, that any specification of the invention had been inrolled. But supposing that case to be applicable here, it may be doubted, whether, if it were reviewed, the Court would support the decision. The several judges who decided the case, rested their decision on different grounds. Lord *Kenyon*, C. J. proceeded on the ground of *fraud*; which did not appear on the pleadings, and was *assumed* by him. *Buller*, J. put his decision on the ground that the pleas were equivalent to pleas of *eviction* in a case of landlord and tenant; whereas the other judges expressly said, that they thought that the case did not resemble that of landlord and tenant. It is submitted that an analogous plea, in the case of landlord and tenant, would not be a good plea of *eviction*. If the plea had gone on to state that in consequence of the invention not being new, the patent had been repealed, or the invention openly used by others, who paid no rent for it, then it would have borne some analogy to the plea of *eviction*. In *Taylor v. Zamira* (b), it was said by *Gibbs*, C. J. “In every plea of *eviction* there is an averment, that the lessor had not a perfect title when he demised. But that fact alone would not be sufficient:—To constitute a plea, to it must be added the fact, that the lessee was *in consequence evicted*.

(a) 3 T. R. 438.

(b) 6 Taunt. 524; S. C. 2 Marsh. 220.

The *whole* is a defence." The party and the jury are estopped from inquiring into the fact, whether the landlord had title, unless it can be shewn that the tenant has not had the *enjoyment* which the landlord covenanted to give him. It is not alleged in the pleas in *Hayne v. Maltby*, nor in the pleas in this case, that the defendant has not had the enjoyment which he covenanted for. It is not shewn, (as it should have been, in order to make the plea amount to a plea of eviction,) that the patent has been revoked and annulled, or that the contrivance was universally or so generally violated by others, (owing to the invalidity of the patent,) that the defendant has had no beneficial enjoyment in return for the rent.

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*Wightman* contra. Estoppels, as Lord Coke says, are so called because they stop or close up a man's mouth to allege or plead the truth;—and therefore they are odious and not to be construed or raised by *implication*, *Palmer v. Ekins* (a). In *Co. Litt.* 352 b., it is said (b) that every estoppel, because it concludeth a man to allege the truth, must be certain to *every* intent and not to be taken by argument or *inference*," and (third rule) "every estoppel ought to be a *precise affirmation* of that which maketh the estoppel, and not to be spoken impersonally. *Neither doth a recital conclude, because it is no direct affirmation*" (c). In the old cases, it will

(a) 2 Lord Raym. 1553.

(b) Third point.

(c) But see the distinction between the recital of a material and an immaterial fact, (*Anon.* 2 Leon. 11; *Co. Litt.* 352, *fourth rule*; Sir A. Cooke's case, *infra*, 208.) and the distinction between a general and a particular recital, in *Shelley v. Wright*, Willes, 12; *Rees v. Lloyd*, Wightw. 130; see also *Hart v. Buckminster*, Style, 108, and *Aleyn*, 52; 1 Roll. Abr. 870, 872; *Willoughby v. Brook*,

*Cro. El.* 756, 757; *Shepp. Touchst.* 53; 10 Vin. 453, 465; *Lainson v. Tremere*, *ante*, iii. 603.

Of the eight cases cited by Lord Coke in support of this part of his third rule, none will, it is conceived, be found to support the doctrine in the unqualified manner in which it is propounded.

The first case vouched by Lord Coke is, *M. 35 H. 6*, fo. 33. In this case the deed, though indented and executed by both parties, was merely a release running in the

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be found that the doctrine of estoppel rather referred to the operative part of the deed than to the *recitals* which it

first person; and the question was, whether the defendant, as *heir* of the releassee, was estopped by the deed with respect to a fact alleged by the *relessor*. The Court said that it was *hard* that the defendant should be bound by such a recital, but decided that she was not bound *because* she was not *heir*.

P. 46, E. 3, fo. 12, pl. 14, was an assise of novel disseisin, in which the defendant pleaded a lease by deed from the demandant,—who replied that at the time of the lease he had nothing in the land. The tenant rejoined the estoppel; and though *some* thought that the demandant was not estopped, yet, instead of demurring to the rejoinder, the demandant waived his replication and took issue on the deed. Accordingly this case is cited by Brooke (Estoppel, pl. 43,) as an authority in support of the estoppel.

*Carr and another v. Huntingfield* (P. 49, E. 3, fo. 14, pl. 8,) was waste against the assignee of a lease. The recital by which the plaintiff sought to estop the defendant from traversing part of the mesne conveyance of the tenancy to the defendant, (to whose title the plaintiff was a stranger,) was contained in the deed of assignment, to which the plaintiff was neither party nor privy,—so that there was no *mutuality*.

Lib. Ass. anno 8, fo. 13, pl. 3, merely decided that a party was not ousted of his challenge to the array, by matter of recital contained in the sheriffs' return to the venire facias.

Lib. Ass. anno 45, fo. 298, pl.

5, *Childon v. Tresk*. In a novel disseisin the tenant gave a receipt or an acquittal bond after action brought, for renting after action brought. It was held that the assise was abated by the admission of estoppel implied in the receipt. The receipt, though by deed, was not by *indenture*, and therefore there was no estoppel for want of mutuality.

*Rainsford v. Smith*, Dye Declaration on a bond conditioned to pay all sums in which A was bound to B.—Plen, that A stood bound to B.—Held, no demurrer by reason of the estoppel.

*Sir Anthony Cooke's case*, 280, b. In this case the question was upon the *materiality* of the allegation contained in the inducement to a plea in bar to an avowry.

In H. 9, H. 6, fo. 59, (the last case cited by Lord Hale,) the defendant, in an action on a bond, pleaded matter shewing the bond to be void. The plaintiff replied that he had brought the action for this bond against a stranger who pleaded that it had been conveyed to him by the plaintiff. The now defendant on certain conditions, &c.—that scire facias sued against the now defendant, that the parties (viz. the plaintiff and the now defendant, as garnishee,) came to issue upon the performance of the conditions; and issue was found for the plaintiff. And it was held to be no estoppel because the defendant, in his character of garnishee in the action of detinue, was not at liberty to plead non est factum.



tained, and in those cases in which recitals have been held to operate as estoppels, the matter of recital has been so interwoven with the operative part of the deed, that it has been impossible to separate them from it.

The plaintiff here has recourse to implication (*a*) and argument, for he says that "inventor" means "*first inventor*," and also "*first inventor of a new invention*".—A man may be *inventor* of a machine and yet not be the *first inventor* of a *new invention*. Consistently with the allegation, he may have been a *second inventor*, and the machine may have been publicly used fifty years ago; therefore the pleas which say that the plaintiff is not the *first inventor* and that the invention is not *new*, are not in direct denial of that which is recited in the deed. It is not denied that he was *inventor*, but a fact is pleaded which may well consist with that which is admitted; and though an admission that a man was an inventor might in ordinary cases be taken to be an admission that he was the first inventor of a new invention, yet that which has been advanced is a sufficient argument against an *estoppel*—which is *strictissimi juris*. [*Taunton, J.* Although estoppels are *strictissimi juris*, we are to construe matters of estoppel according to their obvious meaning;


This last case evidently belongs to another class of estoppels, which Lord Coke afterwards mentions under his *seventh* rule as to *suppositions in pleadings*, a branch of the *exceptiones litis-contestatae* of the civil law.

(*a*) In this case however "implication and argument" appear less to be resorted to (by the *plaintiff*) for the purpose of raising any construction upon the *recital in the deed* for the purpose of creating an *estoppel*, than (by the *defendant*) for that of explaining away the language of the *plea*.—Now if, (as on the part of the defendant, it was contended that the plaintiff ought to have done,) the plaintiff had

taken issue on the pleas, the jury, in dealing with such issues, would have been bound to understand the allegations in the *pleas* according to their ordinary meaning, without regard to any strained construction which might be put upon them for the purpose of evading an *estoppel*. Thus the defendant would have the advantage of avoiding the conclusiveness of the *estoppel* by insisting upon one construction of the language of his plea on the argument of the demurrer,—and also that of re-opening the whole matter upon an issue joined, by then resorting to a different construction.

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and must not resort to all sorts of artifices and distortions in order to prevent a party from being estopped by the words of his deed.] The pleas are consistent with the recital; and the defendant is prepared to show that the invention was in fact used thirty years before it was *re-invented* by the plaintiff. *Hayne v. Maltby* is conclusive in the defendant's favour; for the distinction attempted to be drawn between that case and the present is not a substantial distinction. But supposing the doctrine of estoppel to apply here, the pleas in this case, as in *Hayne v. Maltby*, are good *pleas of eviction*. In the case of landlord and tenant, as long as the tenant has the *benefit* (a) for which he covenants, it is right that he should be estopped from denying his landlord's title; and so here. But here the plea in fact *denies* that the defendant *has* that which he has bargained for, which is, the *exclusive right* to use. If the plea be true in point of fact, all the world has the right of using the machine in the same manner as the defendant. The moment that it is found that the invention is not new, the defendant is *evicted* of his *exclusive right*; and upon that ground the decision in *Hayne v. Maltby* proceeded. The distinction between this case and the ordinary case of landlord and tenant is, that in the case of *land* it is impossible that all the world or any other person can enjoy the land at the same time with the tenant; and therefore there can be no *eviction* unless there be an actual turning out of possession; whereas here, there is a *virtual* eviction the moment that the *exclusive right to use* that which may be multiplied ad infinitum, is shown to be at an end.

*Tomlinson*, in reply. The pleas do not show that the defendant has *not the exclusive right*. Consistently with the pleas, the invention, supposing it to have been invented by a third person and at an earlier period, may never have been *disclosed* by the first inventor; and it has been held that where a man has obtained a patent for an invention, it is no objection to the validity of the patent, that another person had

(a) *Vide ante*, 29n.

previously invented the contrivance and had kept the knowledge of it confined within his own breast. *Taylor v. Hare* (a), though not *directly* in point, may be referred to, because the grounds upon which that case was put by the learned judges who decided it, are at variance with the decision in *Hayne v. Maltby*. According to the argument on the other side, if the defendant had had the exclusive enjoyment of the plaintiff's invention for ten years, and had reaped large profits from that enjoyment, he need not pay the rent which he has covenanted to pay if he can show that he had not the exclusive *right*, so that other persons *might* have used the invention if they had known that the invention was not new, and had thought proper to exercise their right to use it. *Taylor v. Hare* shows that the lessee of a patent pays not for the mere *abstract right*, but for the *actual enjoyment*; and therefore he cannot question the title of his lessor as long as *in fact* he has the exclusive enjoyment. The passage quoted from Lord Coke as to matters of *recital* not operating as estoppels, is inconsistent with a large class of cases, unless it be taken to refer to recitals *foreign* to the subject matter of the contract—which indeed appears to be what Lord Coke had in view. Here, the recital is of a fact upon which the contract is *founded*.

Lord DENMAN, C. J. (after stating the pleadings).—On the part of the plaintiffs, it is urged that the defendant is estopped from alleging the facts contained in the three pleas which have been demurred to. For the defendant, it is first said, that with regard to the allegation that the invention is not a new invention, there is no estoppel, because the plea is not inconsistent with that which the deed avers.

Now we are disposed to think that it *is* inconsistent. It appears to me clearly, that if it is not inconsistent, then the plea is no defence; because if the defendant merely means to say that the invention is not a new one—"it is yours, but it is not a new one; you invented, it is true,

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(a) 1 New Rep. 260.

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it, but then it was known fifty years ago"—that is no reason why the plaintiff should not take out a patent for it; for it is consistent with the plea, that no *other person* had made the same invention.

In the same manner, a denial that the plaintiff is the "first inventor," either imports that he is not the inventor *at all*, or it only imports that he is not the *sole* inventor, inasmuch as somebody else may have hit upon the same discovery. But that argument is open to the same answer, viz. that if by the plea it is meant to deny that the plaintiff is the inventor, then it *does contradict* the allegation in the deed; and if the plea does not mean that the plaintiff is not the inventor, then it is *no answer* to the declaration.

The third plea directly puts in issue matters of fact expressly recited in the deed.

Now undoubtedly the doctrine of estoppel is always held with great strictness,—not, however, because it is to be assumed that the object of a party who pleads it is to exclude the truth; on the contrary, it ought to be supposed that a person, who makes an assertion under his hand and seal, furnishes the strongest evidence that the assertion is true. Still it *may* have the *effect* of excluding the truth; and therefore great strictness is to be observed with respect to it. Here, however, the defendant has asserted by his deed that the letters patent were inrolled in due time; and he now pleads the contrary; which is a distinct denial of a fact which he has asserted by his deed. With regard to the doctrine of Lord Coke, that "a recital doth not conclude, because it is no direct affirmation," it is to be observed that he cites various authorities for his other propositions, but cites none for that (*a*). It rests entirely upon his own authority—upon

(*a*) Lord Coke usually places the letters referring to the notes in the margin *before* the passage in the text to which they are meant to be appended. The printers of the later editions of Co. Litt., overlooking this peculiarity, have drawn the

mark of reference "*(h)*" close to the preceding paragraph, so as to give to the passage in question (the second branch of the third rule) the *appearance* of being unsupported by marginal authorities.

The cases cited by Lord Coke

the authority, it is true, of an individual whose opinions are entitled to the greatest consideration; still, I cannot think that a direct assertion of a distinct and specific fact in a deed is not to estop a man, merely because it is introduced by the word "whereas," or any other word to that effect. I should observe that Lord Coke's doctrine was very seriously and fully considered by the Court in a late case, to which neither party has referred, of *Lainson v. Tremere* (a). That case underwent the greatest consideration, and there never was a case in which the Court would have struggled more strongly to defeat an estoppel than they did in that case. (His lordship here stated the facts of that case.) The averment by which in that case the defendant was held to be estopped, was *by way of recital*; but the Court, upon the greatest consideration of all the cases, ancient and modern, determined that the defendant was not at liberty to enter into any proof of the truth of the plea; because, on a subject directly affecting the interest of both parties in the subject-matter of the contract, he had in his sealed deed recited the fact that 170*l.* was the annual rent. Under these circumstances, I do not feel it at all necessary to enter into a minute examination of the authorities; for those authorities were fully gone into upon that late occasion, and I think we are bound by that case. It seems to me, therefore, that the plaintiff is entitled to our judgment. I would merely add, that it appears to me that the case of *Hayne v. Maltby* has been satisfactorily distinguished by the observations which have been made by Mr. Tomlinson.

TACNTON, J.—The law of estoppel is not so unjust or so absurd as it has been the fashion to represent it to be (b).


in support of his position respecting the non-conclusiveness of matter of recital, will be seen at length, *ante*, 267, 268, n.

(a) *Ante*, vol. iii. 603.

(b) Interest reipublicæ ut sit finis litium.—Interminable litigation would not merely be destructive of the repose of society, but would also operate as a *denial of*

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The principle of it is this—a principle certainly more applicable to ancient times, when deeds were considered more solemn things than they are at present—viz. that where a man has entered into a solemn deed under his hand or seal, he shall not be permitted afterwards to gainsay or deny the truth of any matter stated substantively in that deed. That is a principle by law *established*; and the question here, and the only question as it appears to me, is, whether there is any contradiction in the matter alleged by the defendant in the pleas demurred to, of any matter the truth of which he has acknowledged in this deed. The allegation in this deed is prefaced by a “whereas;” but I am yet to learn that an affirmation is the less positive, (and must be considered as no affirmation at all,) because it is prefaced by the word “whereas” (c). The allegation is “that whereas the plaintiff is the inventor of certain machines,” and so on. The defendant pleads that the said invention neither was nor is a new invention. This, I think, is a direct negation of the averment in the deed; for if it was not then a new invention, it is quite impossible that the plaintiff could have invented it.

Then the case of *Hayne v. Maltby* has been pressed. But I think it is not necessary to examine the grounds of that judgment, because it appears to me that Mr. Tomlinson has averted the pressure of that case, by shewing the

*justice*; for it is not very material whether a party is *refused* that for which he asks, or whether it is offered to him in such a shape that it shall perpetually *elude his grasp*. There must be an ultimate point at which the question shall be,—not which party has the most mere *right*, but, how has the matter been *decided*? The principle “transivit in *rem judicatam*—l’auctorité de la *chose jugée*”—finds a place, therefore, in every system of jurisprudence, and seems to be *essentially* necessary to the ad-

ministration of justice. The same principle appears to apply to cases in which, whether in or out of court, parties, by a solemn compact, made *en connaissance de cause* (with full knowledge, or the means of knowledge, of the law and facts of their case), have ascertained their rights without the intervention of a judicial decision. *Confessus pro judicato est, qui quodammodo sua sententiâ damnatur*. Dig. lib. xlii. tit. 2, l. 1.

(c) And see 1 Wms. Saund. 117 a, note (4).

difference between the two. *Here*, there is what I call an express averment—an affirmative averment that the plaintiff was the inventor of these machines. In *Hayne v. Maltby*, it was merely stated that the plaintiff was *the assignee of the patent*, which he might be although the assignor was not the inventor. That case clearly was not a case of *estoppel*; and it is therefore no authority against the decision at which the Court arrives in this instance.

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PATTESON, J.—In this case, the third plea raises directly the point whether or no there can be an estoppel by a recital in a deed? The first and second pleas do not raise it very distinctly; but in my mind, they do raise the point as well as the third plea. In the deed it is recited, that the plaintiff *has invented* certain improvements in the construction of looms, for which he has taken out letters patent. Now I confess I can put no meaning upon those words—that he has invented—but that he was the *first* inventor, and has invented a *new* thing, for which he has obtained a patent; that he was the “inventor,” *according to the law of patents*. If the words in the first and second pleas, with respect to the invention, are used in the same sense as in the deed and declaration, then there is a direct denial and contradiction;—if they are *not* used in that sense, then the pleas are utterly immaterial. I think, therefore, that the first and second pleas do raise the question of estoppel as much as the third plea, which is a direct denial of the inrolment of the specification; and we then come to the question of how far there can be an estoppel by a *recital*. The only authority which presses upon us is that passage in Lord Coke, that “neither can there be an estoppel by recital.” Mr. *Wightman* admits that there are many cases in which parties have been held to be estopped by a *recital* in a deed; but he says, those cases, if looked into closely, will all be found to be cases in which the recital was so mixed and bound up with the operative part of the deed, that they were *assertions* rather than *recitals*. Here, the recital is manifestly so closely

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connected with the operative part of the deed, that I cannot manage to separate them, and I think they come directly within the rule which Mr. *Wightman himself* has laid down. The passage in Lord *Coke*, therefore, must be taken with some little qualification; and the decision of *Lainson v. Tremere*, which was in last Trinity term (*a*), shews clearly that, in the opinion of this Court, there might be an estoppel by recital. I think, therefore, that the plaintiff is right in the demurrer, and that the defendant is estopped from setting up this defence.

With regard to *Hayne v. Maltby*, it is sufficient to say that there was in that case no estoppel by the recital. There was a case of *Oldham v. Langmeade*, decided by Lord *Kenyon* at Nisi Prius, alluded to in *Hayne v. Maltby*, which (as estoppels are mutual (*b*)) is a strong authority to shew that there *may* be an estoppel in a case of this kind.

Upon the whole, it seems to me, that the current of authority since the time of Lord *Coke*, and particularly that case of *Oldham v. Langmeade*, shew that there may be an estoppel by a *recital*;—and this is one of those cases.

WILLIAMS, J.—I think the demurrer to the first and second as well as to the third pleas, must be sustained. When it is said that a person has invented certain improvements, the meaning obviously is, without argument or inference, that he was the inventor of them so as to make the invention available within the law of patents. The recital is of a fact which is the very foundation of the contract between the parties. The third plea is admitted to be a direct contradiction of the recital in the deed. No *case* appears to have decided that a recital cannot estop; and in *Lainson v. Tremere* (*a*), after very careful and full consideration of the doctrine of estoppel, this Court has decided otherwise.

Judgment for the plaintiff (*c*).

(*a*) *Ante*, vol. iii. 603.

(*b*) *Vide* Co. Litt. 352 a.

(*c*) But where the plaintiff, in-

stead of relying on the estoppel,

takes issue upon the pleas, he

cannot set up the estoppel as ~~not~~



clusive upon the jury at the trial of the issues; *Bowman v. Rostron*, post, H. T. 1835. The pleas in that case were the same *verbatim* as here; and the Court, after verdict for the plaintiff, granted a new

trial, on the ground that the learned judge before whom the cause was tried, had refused to admit evidence to contradict the facts recited in the deed. See 2 Mann. & Ryl. 581, n.

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## BROWN v. SHEVIL.

TRESPASS for taking goods, tried before Lord Denman, C. J., at the sittings at Guildhall, London, after Michaelmas term, 1833.

The plaintiff, a retail butcher, had sent a bullock to Woodham, also a retail butcher, for the purpose of its being slaughtered by Woodham; after the beast had been slaughtered, and whilst it remained on the premises of Woodham, it was taken by the defendant as a distress for rent due to him from Woodham. It was contended, on the part of the plaintiff, that he was entitled to recover the value of the carcase, which, it was urged, was privileged from distress in the same manner that cloth sent to a tailor to be made into clothes is protected, so long as it continues in the custody of the tailor, by reason of its having been sent to him for that purpose. On the part of the defendant it was contended that the carcase was not protected; for that (inasmuch as it was not shewn to be in the ordinary course of the trade, for one butcher to send his beasts to another for the purpose of being slaughtered) it could not be said that *trade* would be restrained or the public convenience affected, by holding the carcase liable to the distress. The Lord Chief Justice was however of opinion that the property was, under the circumstances, protected; and the jury, under his lordship's direction, found a verdict for the plaintiff—damages, 14*l*. A rule nisi for a new trial was in last Hilary term obtained by Hutchinson.

All goods sent to a tradesman for the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress.

As the carcase of a beast in the custody of a butcher, sent to him for the purpose of being slaughtered for the sender.

So, although the sender be also a butcher.

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*F. Pollock* was now about to shew cause, but was stopped by the Court.

*Massy Dawson*, in support of the rule. In *Gorton v. Falkner* (a), *Ashhurst, J.* lays it down as a general rule, "that all chattels found in a person's house are liable to be distrained by the landlord;" and the foundation of this principle, assigned by his lordship, is, "that as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing he finds there." To this general rule there are however some exceptions, and the principle, as applicable to the exceptions, is now clearly settled. In *Gilman v. Elton* (b), *Dallas, C. J.* (alluding to the case of *Gisbourn v. Hurst* (c)) says, that "the exception has been clearly laid down. *Goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under a legal protection and privileged from distress for rent.*" Then it is added, "materials sent to a weaver, or cloth to a tailor to be made up, are privileged, for the sake of trade and commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are." This principle is adopted and confirmed in the late cases of *Wood v. Clarke* (d) and *Adams v. Grane* (e), in which all the former decisions are fully considered. To bring the present case, therefore, within the rule of exemption, it is necessary to hold, 1st, that the trade of a butcher is a *public trade*; 2dly, that it is essential to public convenience and to the carrying on of trade, that the beasts of one butcher should be protected when sent to be slaughtered on the premises of another; and 3dly, that the goods in question were on the premises in the ordinary course of business.

(a) 4 T. R. 568.

(b) 3 Brod. &amp; Bingh. 81.

(c) 1 Salk. 250.

(d) 1 Crompt. &amp; Jerv. 484.

(e) 1 Crompt. &amp; Mee. 380.

I. The trade of a butcher is clearly not a *public* trade. It is no more a public trade than is that of a linen draper. This is not like the cases of a miller, factor, wharfinger, auctioneer, and many other trades, which may be said to be of a *public* nature.

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II. It is not essential either as regards public convenience, or on account of necessity, to trade in general, that this property should be held to be protected from distress. In *Gilman v. Elton* (a), *Dallas, C. J.*, after the observations which have been already referred to, says, "The nature of the exception, on the score of necessity and public convenience, is laid down by *Blackstone* in the argument in *Francis v. Wyatt* (b). It is, where it would be quite impracticable or highly inconvenient to dispose of or manufacture the goods at home." And again his lordship says, "The public convenience runs through all the cases of exception." *Bayley, B.*, in *Adams v. Grane* (c), says, "The privilege in question has been established for a very considerable time. Lord Coke treats of it as being well known, and the principle of exemption, according to him, is, that it is *for the benefit of trade*. Among other instances put by him, is the instance of goods going to a fair or market. Now why should they be privileged? They are privileged because *interest reipublicæ*," &c. As far as the public convenience is concerned, it is matter of indifference where the beast in question was slaughtered. And there was no evidence whatever to shew that it is essential to the carrying on of trade, that beasts should be sent by one butcher to another for the purpose of being slaughtered on the premises of the bailee, nor was it proved to be in the ordinary course of trade to do so. Had the property distrained belonged to a private individual, there might perhaps be some force in the argument derived from public convenience. The case might then have been assimilated to that of materials sent to a weaver, or cloth to a tailor. No private

(a) 5 Brod. & Bingh. 81.

(c) 1 Crompt. & Mecs. 387.

(b) 1 W. Bla. 484.

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individual can be any more expected to slaughter his own beasts than to make his own clothes. But this is a widely different case. In order to have made out a case of exemption, it should have been shewn that the practice contended for was either so convenient to the public, or so absolutely necessary to the effective carrying on of trade, that the landlord, when he let the premises, must be taken to have anticipated it. Sir *William Blackstone*, in his *Commentaries* (a), after enumerating several articles as exempt from distress, says, "All these are protected and privileged for the benefit of *trade*, and are supposed in *common presumption* not to belong to the owner of the house, but to his customer." And *Bayley, B.*, in *Adams v. Grane*, says, "The privilege has from time to time been extended, according to new modes of dealing established between parties; and one of the modern modes is the case of a factor; and I should observe what is noticed by Mr. Justice *Blackstone*, in his *Commentaries*, that there is no hardship in the privilege which is allowed to exist in these cases, because the privilege generally arises to *goods which no one could suppose* to be the property of the individual from whom the rent was due."

III. Where a party claims to be exempt from a general rule, he is called upon to make out the exemption by evidence. And it consequently was not sufficient for the plaintiff merely to shew that the beast was originally sent for the purpose of being slaughtered; he ought to have gone further, and to have shewn that *at the time of the distress* it had not been suffered to remain for more than a reasonable time on the demised premises. To this effect is the remark of *Bayley, B.*, in *Adams v. Grane*, on the case of *Francis v. Wyatt*.

Lord DENMAN, C.J.—It appears to me that this case was protected from distress, upon the general principle that it is essential to trade that this protection should

(a) 3 Bla. Com. 8.

exist. There are a variety of cases of exemption collected in *Com. Dig.*, "Distress," (C) within the principle of which this case comes. *Gisbourn v. Hurst* (a) is referred to as establishing this general proposition, that "*any goods delivered to a person in the way of his trade*" cannot be distrained. The word "public" has been observed upon; but I cannot admit that the trade of a butcher is not a public trade, within the meaning of the rule laid down in the case of *Gilman v. Elton*. Some observations were thrown out in the late cases, from which it might at first be inferred that the supposed *knowledge* of the landlord that the goods in his tenant's possession were not *his own*, was the principle upon which the exemption rests; but those cases were not *decided* upon that principle. If cloth, sent to a tailor to be made into clothes, is protected, so, as it appears to me, a beast, sent to a butcher to be slaughtered, is also protected. I cannot distinguish the two cases; and it seems to me that this case falls within the general principle.

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TAUNTON, J.—I am entirely of the same opinion. The old cases upon the subject are collected in *Com. Dig.*, "Distress," (C) from which it appears that where goods are brought to a tradesman for the purpose of being operated upon in the way of his trade, they are protected. Many of the instances there put are more in favour of the power of distress, in my judgment, than the present. There is the case to which my lord has referred,—of *Gisbourn v. Hurst*, which I think much stronger than the present. There it appeared that *Richardson*, a carrier, when he returned home with his waggon, put some cheese (the subject-matter distrained) into a barn, where it continued two nights and a day, and then the landlord distrained the cheese for rent due for the house, which was not an inn, but a private house; so that there the distress was made,

(a) 1 Salk. 250.

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not in a dwelling-house, but in a barn; and it was held that the goods could not be distrained. It was agreed by the Court that goods delivered to any person exercising a public trade or employment, to be carried, brought, or managed, in the way of his trade or employment, are for that time under a legal protection, and privileged from distress for rent. It is said that the trade of a butcher is not a *public* trade. I myself do not know any trade more public, or the carrying on of which is more convenient or more necessary. I do not see why this carcase should not be privileged as well as corn at a miller's:—Both are sent for the purpose of being turned, as far as they can be, into articles of food, equally necessary perhaps to the *British public*.

Then it is also said that this was not brought to be wrought or managed in the way of the party's trade or employ. It was taken there to be slaughtered; and I do not think that any instance can be put in which any article is brought to a tradesman's premises more completely in the way of his trade or employ, or more to be wrought or managed in the way of his trade or employ, than this animal appears to have been. Now, Lord *Holt* refers to a case in *Cro. Elix.* 596 (a), where two tradesmen brought their yarn to a neighbour's beam, which he kept for his private use; and it was held that the yarn could not be distrained. This case was recognized by the Court of Common Pleas in *Thompson v. Mashiter* (b). This is no new law: it is as old as the reign of Queen *Elizabeth*, acted on in various instances from that time to the present; and I think it applies to the present case.

It appears to me therefore that the plaintiff is entitled to judgment.

PATTESON, J.—I am also of opinion that the carcase was protected from being distrained, upon the general

(a) *Rede v. Burley*.

(b) 1 Bingham 283.

ground that when originally deposited it was in the hands of the butcher in the way of his trade, he having to do something upon it in the way of his trade and it remaining in his hands afterwards. I cannot distinguish this from the case of a tailor. It may be that the tailor's trade was originally to make clothes out of cloth delivered to him by other people, yet at the present day we know that this is not the case—we know that it is not, according to the custom of the present day, at all *necessary to the carrying on of a tailor's trade* that he should make up the cloth of other people.

There are several cases cited in *Comyns's Digest*, which have been already stated; but *Francis v. Wyatt (a)* seems to have been relied on by Mr. Dawson. That was the case of a chariot in the hands of a livery stable keeper, which was held not to be protected. But it is to be observed that in the report of it in 3 *Burrow*, there is no judgment given by the Court in form; and from that which does appear, it would rather seem that the plaintiff *gave up* the point. Besides, there is this difference between the cases,—that a chariot in the hands of a livery stable keeper is there in his *custody* merely; whereas here there was something *to be done* by the person to whom the beast was sent, in the way of his trade. The question then comes to this, whether it is necessary that the trade should be a *public* trade. Now I confess that I do not understand what is meant by a *public* trade. I can understand that the trade of a common carrier, or of an innkeeper, is in a certain sense *more public* than ordinary trades; but the trade of a *tailor* is not, in the same peculiar sense, public; for it is quite clear that a tailor is not *under any legal obligation* to take in cloth to make a coat. I am at a loss to see how you can distinguish that trade from the trade of a butcher, and say that the latter is not a public trade. I certainly find in one of the old Reports that it was stated that by

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(a) *Supra*, 279.

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an old statute tailors were compellable by law to make clothes; but this was afterwards repudiated. It seems to me therefore, that what is sent to a person really for the purpose of being dealt with in the way of his trade (and the jury have found the fact to be so here), should be protected from distress for rent.

WILLIAMS, J.—I am of the same opinion; and on the ground lastly put, that this might be considered as a deposit of the article in question for the benefit of trade. It frequently happens, no doubt, in this metropolis, that one butcher may find it requisite to send his beasts to another butcher to be slaughtered by him; and by consequence it may be, and probably is, as much for the benefit of trade that an animal, sent for that purpose to such other butcher, should be protected, as is the protection afforded in any of the instances that have been quoted.

It has been suggested that where the business is of a *public* nature, the landlord has more reason for supposing that goods found on the premises may be the goods of other persons, and that this was a foundation of the rule; but in the very cases that have been cited, and particularly in the last case in the Exchequer (*a*), upon which reliance has been placed, the principle by no means applies. That case was the case of a private workman, entrusted with possession of articles for the purpose of being operated upon in the way of his employment.

It appears to me therefore that the privilege claimed is for the convenience and benefit of trade; and that the article was protected on that ground.

Rule discharged.

(*a*) *Adams v. Grane*, 1 Crompt. & Mee. 389; *Supra*, 279, 280.



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## DOE on the demise of WETHERELL v. BIRD.

**EJECTMENT** for a dwelling-house, &c. at Kensington, Middlesex, upon a proviso for re-entry. At the trial before Lord Denman, C. J., at the sittings at Westminster after Michaelmas term, 1833, the following facts appeared:—

1802. The premises were demised, by indenture, by the father of *Wetherell* to *Soilleux*, habendum to S., his executors, administrators, and assigns, for sixty-one years. The lease contained (amongst others) a covenant on the part of the tenant to repair and uphold, &c., and also a covenant not to "permit or suffer any person to inhabit or dwell in or upon any part of the premises who should use or exercise any trade or business of butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, tobacco-pipe burner, soapboiler, or any other offensive trade," without the special licence of the landlord,—with a proviso for re-entry in case of a breach by the tenant of any of the covenants to be performed on his part. The premises consisted, at the time of the lease, of a private dwelling-house, with the usual appendages. The house had since been occupied as a boarding-school for boys, and afterwards as a boarding-house for French emigrants. *Soilleux* subsequently assigned to the defendant, who mortgaged to *Finch*, the real defendant in the case. *Finch* had very considerably added to and improved the edifice, and had since occupied it as an asylum for the reception of insane persons. This mode of occupation was relied on by the lessor of the plaintiff as a breach of the second of the two covenants above-mentioned, and the removal of an old wall (to prove which fact some evidence was adduced) was relied upon as a breach of the first covenant. The jury found in favour of the plaintiff in respect of both breaches. In the following term Sir James Scarlett obtained a rule nisi for a new trial, upon the grounds, first, that the facts did not shew a breach of the covenant not to carry on an offensive trade; and secondly;

The converting of a demised house into a *lunatic asylum*, is not a breach of a covenant not to "use or exercise any trade or business of butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, soapboiler, or any other offensive trade."

In such a covenant, the words "*trades*" and "*businesses*" must be taken to be used in different senses, and the former must be confined to businesses conducted by buying and selling.

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that the verdict was against evidence; and thirdly, upon affidavits, that in respect of the supposed breach of the covenant to repair, the defendant had been taken by surprise.

*Campbell, A. G., F. Pollock, and F. Kelly*, shewed cause. The simple question upon the first part of the rule is—whether the keeping of a mad-house is a *trade* within the meaning of the covenant; for its being *offensive* will hardly be disputed. It was urged upon the moving for the rule, that the Court would lean against a construction which would create a forfeiture, for that forfeitures are odious; but the question upon this covenant must be precisely the same, in this action of ejectment, as if there had been no proviso for re-entry for breaches of covenant, and the action had been in *covenant*; and if the action were *covenant*, it cannot be contended that the Court would be warranted in *leaning against* that construction which the plaintiff puts upon it. It was said that the “*offensive trade*” contemplated by this covenant was such a trade as might be made the subject of action or indictment as a private or public nuisance; but this argument is defeated by another which is brought forward, viz. that the trade must be *ejusdem generis* with those that are specifically mentioned, some of which, it is quite clear, could not possibly be treated as nuisances. Then it was said, that the *trade* must be such as would constitute a trading within the bankrupt laws, and must consist in *buying and selling*. There is no ground for giving this limited meaning to the word “*trade*.” A “*trade*” is any pursuit or occupation, other than a science or profession, by which a man seeks to obtain a livelihood<sup>(a)</sup>. A fisherman who *sells* fish is a trader, though he does not *buy*. In *Doe d. Bish v. Keeling* <sup>(b)</sup> the keeping of a school was held to be a breach of a covenant not to use or exercise upon the demised premises any *trade or business* whatsoever. It is true that in that

(a) The freeholder who grows and sells corn, is therefore no longer “*procul negotiis*.”  
 (b) 1 Maul. & Selw. 95.

case the words were "any trade or business whatsoever," but those words are in common understanding synonymous expressions, and are clearly so used in the earlier part of this covenant itself. One of the trades enumerated is that of a tallow-melter, which in the year 1802, when this lease was executed, was not a trade within the bankrupt laws. It might admit of considerable question whether this occupation would not come within the bankrupt laws, for there seems to be no difference in principle between the trade of an ordinary coffee-house keeper, and that of a person who seeks to gain his livelihood by keeping an asylum for the reception of insane persons. In both cases, the profits arise, in a great measure, out of the dealing in provisions for supplying the inmates of the respective houses. The covenant must be construed according to the intention of the parties, as far as that can be collected from the instrument; and it is submitted that nothing can be more clear than that the keeping of a mad-house is such an offensive trade as the parties contemplated.

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Sir James Scarlett, *Thesiger*, and *Steer* contra. It is admitted that this covenant is not to be construed with extreme strictness; but it must be taken most strongly in favour of the tenant, and against the party for whose benefit it was introduced. The substantial inquiry upon this covenant, is—what did the parties contemplate when the words "or any other offensive trade" were introduced? The answer cannot depend upon any *philological* or *legal* inquiry into the meaning of the word "trade," but upon common understanding. Now, according to common understanding, a buying and selling are necessary to constitute a man a trader; and it may confidently be asserted that the keeping of an asylum for the reception and cure of insane persons was *never* before termed "a trade." It is to be observed, that in the earlier part of this covenant the words "*trade*" and "*business*" are both used; whereas, in that part of it upon which the question directly arises, the word "*business*" is omitted. This omission *may* have been accidental, but it must be taken to

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have been designed. The parties having used both words in one part of the covenant, and omitted one of them in another part, must be supposed to have used them, not as synonymous terms, but as having each a separate and distinct meaning. *Doe d. Bish v. Keeling* (a) has no substantial analogy, therefore, to this case; for in that case the covenant was against carrying on any offensive *trade or business* whatsoever upon the demised premises; and a distinction was there expressly taken by *Le Blanc, J.* between a "trade" and a "*business*," "which," he says, "must be intended of something not falling within the description of *trade*." In *Jones v. Thorne* (b) the carrying on of the business of a *licensed victualler*, was held to be no breach of a covenant against carrying on certain trades and businesses, or any other trade or business that might be or grow or lead to be offensive to, or any annoyance or disturbance to any of the tenants of the covenantee.

Another objection to the verdict is, that even supposing a mad-house to be a "*trade*" within the meaning of the covenants, it is not such an "*offensive trade*" as they contemplated. By "*offensive*," the parties must have meant "*offensive to the senses*," as the sight or smell; whereas the vicinity of a house in which insane persons are confined can only be offensive to the *imagination*. The words ought to be limited to those trades which are a nuisance to the ordinary senses of men, and which through the medium of their *senses* affect their health or comfort. *Here*, the offensiveness, (as it depends on taste and imagination,) is of too uncertain a nature to be capable of being properly ascertained. In the covenant in *Doe v. Keeling*, the word "*offensive*" does not occur.

The counsel on both sides argued upon the affidavits on the question whether the defendant was entitled to a new trial on the ground of a *surprise*.

*Cur. adv. vult.*

(a) *Supra*. 286. (b) 3 Dowl. & Ry. 152; 1 Barn. & Cressw. 715.

Lord DENMAN, C. J., in the course of the term delivered the judgment of the Court as follows:—

The two covenants for breach of which the plaintiff had a verdict, were for pulling down a wall, and for carrying on an offensive trade upon the demised premises. With respect to the former, the defendant has entitled himself to a new trial by raising considerable doubt whether the facts were fairly brought forward. It must be on payment of costs. This, however, could avail him nothing, if the verdict could stand for the other and more important breach; and it has become necessary to consider whether the verdict recovered upon it can be sustained.

The terms of the covenant are, that the lessee shall not carry on any of the *trades or businesses* enumerated, or any offensive trade whatever. [His lordship here repeated the words of the covenant.]

The question is, whether these words comprehend every occupation carried on for the purpose of profit, and include the business of keeping a lunatic asylum, to which use the premises have been converted.

It was argued that *trade* does not necessarily consist of buying and selling, though the *bankrupt* laws are restricted to *trades* of that description; that the lessor's obvious meaning was to interdict, not buying and selling merely, but any kind of occupation which is offensive, as the jury have expressly found this to be. But supposing these general observations to be correct, and that such must have been the object of the lessor in requiring the covenant, we can only collect the obligation actually entered into from the terms of the contract. Now it commences with prohibiting *trades* as well as *businesses*—two words which *may* be synonymous, or may have a different meaning;—and when we find in the latter part of the sentence, that one of the words is retained, and the other omitted, we cannot extend the meaning of that which is retained to the more general sense which may be given to that which is omitted. Every trade is a *business*, but every business is not a *trade*: to answer that description, it must be conducted by buying and selling, which the

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business of keeping a lunatic asylum is not. This argument is strengthened by observing that the trades and businesses *enumerated*, are such as are conducted by buying and selling; and if the same general word must be held to introduce any others in addition, these at least must be *ejusdem generis* with the former.

Therefore, as the verdict proceeded on the assumption that the defendant's business was a *trade* within the terms of this covenant, there must be a new trial.

Rule absolute (a).

(a) On the new trial in Feb. 1835, the forfeiture was waived.

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A custom in the city of London, that a freeman of the city shall not set on work, in the manual occupation of a butcher, a person who is a foreigner to the liberties of the city, is good.

When in a bye-law of a corporation—making certain regulations, for breach of which, parties are to be liable to be sued for a penalty,—there is a separate proviso making certain exceptions; a party suing for breach of the bye-law need not aver in the declaration, that the case was not within the exception in the proviso; but such fact, if it exist, must be shewn by the defendant by way of excuse.

DEBT brought in the Lord Mayor's Court to recover 5*l.* penalty for a breach of an act of the Common Council, made on the 4th of July, 11 *Ann.* Plea: nil debet. On the 19th of July last the defendant caused a writ of habeas corpus to be issued out of this Court to the mayor, aldermen and sheriffs of London, commanding them to have the body of the defendant, (detained in prison under their custody, as it was said,) together with the day and cause of his being taken and detained, before the Chief Justice.

The return was to the following effect:—

There has been from time immemorial a custom within the city, that no person shall be wittingly suffered to exercise, use, or occupy any manual occupation or handicraft, or to sell or put to sale any wares and merchandizes, by retail, in any shop, inward or outward, or other place or room kept for show, sale, or putting to sale of any wares or merchandizes, by retail, within the said city or liberties thereof, unless he be free, or apprentice with some one that be free, and bound by indenture according to the custom of the city; and that no artificers or handicraftsmen, or other

shopkeepers or traders by retail, being free of the city, be permitted to employ, hire, or set on work in any such handicraft or manual occupation, or in buying, selling, or exposing to sale by retail, any wares or merchandizes, within the said city or liberties thereof, any person whatever not being free of the city, or apprentice, as aforesaid.

By ancient custom the mayor and aldermen of the city, with the consent of the commonalty in common council assembled, have from time immemorial been used to make ordinances for the remedy of any defective custom, or for providing remedies, where none before existed, for the common good of the city and others resorting thereto, so as those ordinances be consonant to good faith and reason, and in no wise prejudicial to the king or his people, nor in any manner repugnant or contrary to the laws or statutes of England; which custom, and all other customs, liberties, privileges and franchises of the city, were by the authority of a parliament held 7 *Rich. 2* (a), ratified and confirmed to the then mayor, and commonalty, and citizens of the said city, and their successors.

In a common council held 4th of July, 11 *Ann.*, a bye-law was made, which recites the custom first above set out, and that it had been infringed by divers persons who had employed foreigners, and had refused to employ the honest poor citizens and freemen of the city, to the great hindrance loss and prejudice of the said poor citizens, and to the utter undoing of a great number of poor handicraftsmen and other persons bred to trades and not of ability to set up the same, being citizens and freemen of the city, unless some speedy remedy were provided,—and for reformation thereof enacts, that no person whatsoever, not being free of the city, shall at any time, by any colour, way or means whatsoever, directly or indirectly, by himself or any other, use, exercise, or occupy, any art, trade, mystery, manual occupation, or handicraft, whatsoever, or keep any shop or other place whatsoever, inward or outward, for shew, sale,

(a) 3 Rot. Parl. 160, (not in the statutes at large.)

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or putting to sale of any wares or merchandizes whatsoever, by way of retail, within the said city or the liberties thereof, upon pain to forfeit 5*l.* for every breach of this regulation; and it further enacts, that no person, *being free* of the city, shall, by any colour, way or means whatsoever, *set on work in any manual occupation or handicraft, within the city or liberties, any person, being a foreigner from the liberties of the city*, knowing, or having due notice given him, that such person so by him to be set on work is a foreigner as aforesaid, upon pain of forfeiture of 5*l.* for every time that any such person shall offend, commit, or do anything contrary to the purport, true intent, and meaning, of that enactment; and further, that no person being free of the city, and who shall, by himself or by any other, keep any shop, &c. (as before), or use any art, trade, &c. (as before), within the city or liberties, shall, directly or indirectly, *employ, retain, or keep in his service as journeyman or hired servant*, in buying, selling, or exposing to sale any wares or merchandizes whatsoever, by way of retail, *any person not being free of the city*, knowing, or having due notice given to him, that such person so by him employed, retained or kept, is not free of the city, upon pain to forfeit 5*l.* for every time wherein any such person shall offend, commit, or do anything contrary to the true intent and meaning of that enactment: Proviso, that nothing therein contained shall be construed to prohibit any citizen and freeman from keeping in his service any person being under the age of 21, upon trial, in order to be bound his apprentice, for any time not exceeding three months, or to extend to charge any freeman dealing in coarse or heavy goods, from employing any servant, hired for yearly wages and dwelling with him, in the weighing, rummaging, lading, or unlading, of any goods or merchandize in the way of his trade, or in any laborious work *not concerning the art, skill and mystery of the same*: Further proviso, excepting out of the operation of the bye-law the governors of Christ Hospital and Bridewell, or any other of the hospitals belonging



to the city for the time being, for the setting on work either strangers or foreigners within the said houses, and the strangers or foreigners that shall so happen to work therein; and freemen of the city having or setting on work any *apprentice* in any art, &c. within the city or liberties, and any such apprentice that shall so serve, so as his indenture of apprenticeship be inrolled in the chamberlain's office, according to custom: Further proviso, excepting any person, being free of the city, for setting on work persons being feltmakers, capthickers, carders, spinners, knitters, or brewers, and any person keeping any brewhouse within the city or liberties. And it is thereby further enacted, that all the penalties and forfeitures thereby imposed on any offender, shall and may be sued for and recovered by action of debt, bill, or plaint, to be commenced and prosecuted in the name of the chamberlain of the city, in any court of record within the city.

This act has always been used and approved, and now is in full force and effect, and in nowise annulled or repealed.

Before the coming of the writ of habeas corpus, *Poynter* was taken within the city, and detained in the king's prison, under the custody of the sheriffs, by virtue of a certain bill original, on the act of common council made as aforesaid, prosecuted before the mayor and aldermen in the Guildhall of the city, according to custom, in a plea of debt.

The return then set out the declaration, which recited the act of common council, and alleged that the defendant (although well knowing), not regarding the act of council, nor the penalties therein contained, being free of the city, *did set on work, in the manual occupation of a butcher, one William Cooke*, within the liberties, being then a foreigner from the liberties, the defendant knowing, or having due notice given to him, that *Cooke*, at the time he was set on work by the defendant as aforesaid, was a foreigner from the liberties; whereby he has forfeited 5*l.* The plea of the general issue, *nil debet*, was set out.

The return concluded—and this is the only cause of

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taking and detaining the said *Thomas Poynter*, in the said writ named,—which, together with his body, we have ready, as by the said writ is required.

*Follett*, for the plaintiff, in last Michaelmas term, obtained a rule nisi for a *procedendo*; against which, in last Hilary term,

*Platt* shewed cause. I. The bye-law and the custom are both bad. They are in restraint of trade and unreasonable. They may have the effect of depriving a man of the possibility of procuring labour; for the case of there being an insufficient number of or no freemen or apprentices to be found, is not provided for. From *Com. Dig. By-Law*, (C. 3,) it appears that customs and bye-laws, not more in restraint of trade or more unreasonable, than that now under consideration, have been held void. If the custom and bye-law had provided means by which a freeman, carrying on trade within the city and liberties, could compel the city to provide a sufficient number of labourers, they might have been free from objection. :—But no such means are provided. In *Fazakerley v. Wiltshire* (a) it was held, that a custom of the city of London that none but *free porters* shall carry corn &c. was good, on the ground that it was a *convenience to the public*, and that there was an *obligation* on the part of the city to provide porters. In *Cuddon v. Eastwick* (b), “a bye-law that all strangers coming into the port of London should employ city porters to carry their goods &c. was held naught. *Et per Cur.* They may make a bye-law that none but freemen shall be porters, but to confine strangers to none but such as are city porters is unreasonable,”—one of the reasons assigned for which is, “that if the city will appoint no porters, they have no remedy against the city.” If the custom and bye-law had been that no freeman carrying on trade in the city should employ any but a freeman or an apprentice in *his trade*, they might be held not unreasonable. [*Patteson, J.* Here, the party was employed in the trade of his employer.]

(a) 1 Stra. 462.

(b) 1 Salk. 143.

It is true that the *declaration* alleges that the defendant did set on work the person employed by him in the *manual occupation of a butcher*, but the *bye-law* (the validity of which is now questioned) is not so restricted. The employing another to sweep out the shop of the free tradesman, or in delivering bills, would be within the terms of this bye-law. The prohibition is therefore too extensive, and on this ground, as well as on the ground that no remedy is provided for the trader in case of a deficiency of labour, it is submitted that the bye-law is bad and void. [*Littledale, J.* It has been held that the statute of 5 *Eliz. c. 4*, does not extend to persons employed in the house of the trader. The same construction must be put upon the bye-law.]

II. Assuming that the custom and bye-law are good, the declaration in the action below is bad, and that being so, the Court will not award a *procedendo*. The bye-law contains provisoes which *except* out of it employment of strangers under certain circumstances; and this being a penal action, the declaration ought to have negatived that this case came within any of the exceptions.

*Follett and Gurney, contra.* This bye-law would certainly have been bad if there had been no custom to support it; but there having been a custom to the same effect, the bye-law is unobjectionable. The customs in the city of London have been confirmed by act of parliament. *Clark v. Denton (a)* and *Shaw v. Pope (b)* have both decided that other parts of this same bye-law are good; and those parts of the bye-law were not less in restraint of trade than that part upon which the question in this case turns. [*Tarrant, J.* The question involved here is a very important one. This is very different from a custom or a bye-law that no one but a freeman shall set up a trade. In *Beach quest tam v. Turner (c)* it was held by Lord Mansfield, that a man who exercised the trade of a currier as a journeyman

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(a) 1 Barn. & Adol. 92.

(b) 2 Barn. & Adol. 465.

(c) 4 Burr. 2449.

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was not within the statute of *Elizabeth*.] The bye-law in this case goes further than the act of parliament; and a custom for a free tradesman not to employ, in any manual occupation or handicraft, any one but a freeman or apprentice, is not more in restraint of trade than a custom that none but a freeman shall *set up* trade. [Lord *Denman*, C.J. Though there may be no difference in *principle*, the extent of the *operation* of the two customs is very different.] The custom of the city of London, that none but free porters shall carry corn &c. (a) (which was held good) is similar both in its principle and its operation. It is no sufficient objection to a custom, or to a bye-law supported by a custom, that it is in restraint of trade. Many such customs have been held good. This bye-law does not do more within the city of London, than the statute of *Elizabeth* does throughout the whole kingdom. This custom, and many others, which may be said to be in restraint of trade, have been allowed to prevail with a view to the increase of the population and of the prosperity of the city, and they have received the sanction of parliament. This very custom appears to have been brought before the Court in Trinity term, 1742, and to have been held good (b).

II. The objection to the declaration, supposing that it really exists, cannot be made a ground for refusing a *procedendo*. If the declaration is bad, the defect may be taken advantage of by writ of error, as was said in the latter part of the judgment in *Clark v. Denton* (c), citing *Horton v. Beckman* (d) and *Sherborn v. Bostock* (e). But it was *not* necessary to state in the declaration that the case was *not* within the exceptions, for the exceptions are in provisoe distinct from the enacting clause. In *Steel v. Smith* (f) it was held, that where an act of parliament, in the enacting clause, creates an offence and imposes a penalty, and it

(a) *Fazakerley v. Wiltshire*, 1 Stra. 462.

(b) MS.

(c) 1 Barn. & Adol. 103.

(d) 6 T. R. 760.

(e) *Fitzgibb*, 51.

(f) 1 Barn. & Alders. 94.

the same section there follows a proviso, containing an exception, which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such exception in his declaration. Therefore, if an action were brought in *this* Court under similar circumstances, the declaration would have been good as it now stands, and consequently the declaration in the action below is good.

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Lord DENMAN, C. J.—With regard to the latter objection, I think that if this case was within the proviso, it lay on the defendant to state that fact.

Upon the other point we will take time to consider. We shall be glad to find that this case was decided in 1742.

LITLEDALE, J.—It was not necessary for the plaintiff to state in his declaration that this case did not come within the proviso. In *Rex v. Pemberton* (a), an application was made to quash an indictment on 5 *Eliz. c. 4, s. 31*, for exercising the occupation of a tanner, not having *served an apprenticeship* therein for seven years,—on the ground that the indictment ought further to have specified all the *other qualifications*, besides that of serving such an apprenticeship, allowed by subsequent statutes respecting tanners, and to have shewn that the defendant was not within any of them; and it was held that such other qualification must be shewn *by the defendant* by way of excuse, either by plea or in evidence. The distinction has been taken in a variety of cases, between a proviso introduced *into the body of the enacting clause*, (in which case alone the declaration must deny that the case falls within the proviso,) and a proviso distinct from the enacting clause; *Ward v. Bird* (b), *Gill v. Scrivens* (c), *Speeres v. Parker* (d).


Upon the second question, we wish for further time to consider. I would only observe, that if it should appear,

(a) 2 Barr. 1035.

(c) 7 T. R. 27.

(b) 2 Chitty's Rep. 582.

(d) 1 T. R. 141.

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(supposing the custom to be good,) that there ~~were~~ no other persons than strangers to be employed, that would be an answer to the action in the Court below.

TAUNTON, J.—I have very great doubt as to the validity of the custom. I see a very great distinction between a custom restricting foreigners from setting up a trade, and one restricting qualified persons from employing foreign journeymen. If this very custom was before the Court in 1742, it will be satisfactory to us,


PATTESON, J. concurred.

*Cur. adv. vult.*

Lord DENMAN, C. J., in this term, delivered the judgment of the Court as follows:—This was an action brought by the chamberlain of London for a penalty incurred by infringing a bye-law of the city,—the validity of which bye-law was the principal question discussed before us. That bye-law, being in restraint of trade, would be bad, unless supported by a special custom. A custom to the same effect as the bye-law has been set out in the return, and the question then comes, whether the custom is so unreasonable that we must hold it void. It has been in many cases determined, that a custom restraining all persons not free of a city or town, from *setting up a trade* therein, is good. And the statute of 5 Eliz. c. 4, restrains persons from exercising trades who have not served a seven years' apprenticeship. But it has been held, (in *Beach, qui tam, v. Turner (a)*,) that the penalties imposed by that act, in case of an infringement of its provisions, do not attach upon a person exercising a trade as *journeyman* to a person duly qualified. But in the same case it was said by Lord Mansfield, that the spirit of the statute meant to prevent the master himself, being qualified, from employing unqualified persons, though the penalty did not attach upon the jour-

(a) 4 Burr. 2449.

neyman himself. If that be so, the provisions of the statute and those of this bye-law, closely resemble each other. The question is not whether a regulation of this sort *now* for the first time introduced by a bye-law, is bad, but whether the custom, originating in ancient times, was in those days unreasonable. Now it is recited in the bye-law, that owing to the infringement of this custom, many poor free artificers and others, who had been bred up in a trade which they were not of ability to set up of themselves, and who were free of the city, were out of employ. Upon a full consideration of the question, we are upon the whole of opinion that the custom is not unreasonable, and that therefore the bye-law is good. We wished to ascertain whether or not the precise question in this case had been decided in 1742, as we were informed. Upon looking into the documents relating to the matter, we think that there is strong reason to believe that the question was so decided; but this fact is not so well ascertained that we could venture to act upon the supposed decision as an authority.

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Rule for a procedendo absolute.


**The KING v. The Justices of KENT.—Ex parte TENTERDEN Select Vestry.**

A Rule nisi for a mandamus had been obtained, calling upon certain justices of Kent to insert the names of *Vigil Pomfret*, and *Thomas Blackmore*, in the appointment of the select vestry for the care and management of the concerns of the poor of the parish of Tenterden.

From the affidavits, it appeared, that *Vigil Pomfret* and *Thomas Blackmore*, together with eighteen others, had

The magistrates are bound, under 59 Geo. 3, c. 12, to appoint all persons nominated and elected by the parishioners, to be members of the select

vestry, and have no discretion to reject any person so nominated and elected. An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish. An overseer may be a select vestryman, by virtue of an election by the parishioners, although he be also a member of the select vestry by virtue of his office.

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been, at a vestry held 31 March, 1834, nominated and elected members of the select vestry for the ensuing year. Mr. *Pomfret* was one of the five justices of the peace, acting for the hundred of Tenterden, which is a very limited district, and contains only 3150 inhabitants. Mr. *Blackmore* was one of the overseers of the poor. When the list of persons elected for the select vestry was presented to the magistrates acting for the hundred of Tenterden, they struck out the names of Mr. *Pomfret* and Mr. *Blackmore*, and omitted them in the warrant of appointment.

First point:  
 Discretionary  
 power.

Sir *James Scarlett*, and *J. Jervis*, now shewed cause. By 59 *Geo. 3*, c. 12, the justices have a discretionary power of rejecting any members inserted in the list presented to them, provided five remain to act as a select vestry. It is clear that the justices have a discretionary power given to them, by the statute which regulates the appointment of *overseers*. The select vestry perform the duties of *overseers*. Construing, therefore, the 59 *Geo. 3*, c. 12, with the statute in *pari materia*, it will appear that the justices have a discretionary, and not a merely ministerial power. Great inconvenience might result from a contrary construction.

Second point:  
 Incompati-  
 bility.

II. Assuming that the magistrates have not a discretionary power, yet if the party rejected have another office, which cannot be held together with that of a select vestryman, this Court will not grant a mandamus. The offices of a *magistrate* acting in the district, and of a *select vestryman*, are incompatible. If magistrates might be members of the select vestry, that body might consist entirely of magistrates. There is an appeal in certain matters from the select vestry to the magistrates:—Mr. *Pomfret* might therefore have to hear an appeal against an act in which he had taken a part. The parish officers are under the direction of the vestry, and are liable to punishment before justices. Mr. *Pomfret* might be called upon to determine



a dispute relative to overseers' accounts, which he had previously approved of as a select vestryman. *Blackmore* was, by virtue of his office of overseer, a member of the select vestry, and therefore his appointment was wholly unnecessary. [*Patteson*, J. If the magistrates strike out any names, it does not appear how the vacancies can be supplied.] Such a power may be implied. Where two offices are incompatible, the party cannot take the second office. *Rex v. Gayer* (a), *Rex v. Patteson* (b).

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*F. Pollock* and *Petersdorf* in support of the rule. It is admitted that if the magistrates have a *discretionary* power, *this* Court will not interfere by mandamus. The justices have, however, no discretion. The fact of election being made out, the magistrates are bound to appoint the parties elected. In the act which has been adverted to as being *in pari materia*, the word "require" does not occur. At common law every inhabitant had a right to vote in vestry, and there is no reason why the fact of being a magistrate should incapacitate an inhabitant from becoming select vestryman. In *Rex v. The Trustees of St. Mary Abbots, Kensington* (c), the churchwardens and others were, by a local act, appointed trustees for putting the act into execution, and certain other trustees were to be elected in case of death, removal, or disqualification, so that the number should be filled up to fifty-one, besides the vicar, churchwardens and overseers for the time. It was held, that the circumstance of one of the fifty-one trustees having become churchwarden did not create a vacancy.

Lord DENMAN, C. J.—The magistrates have nothing to do but to appoint those *nominated and elected* by the parishioners; whatever inconvenience may result from the

(a) 1 Barr. 245.

& Adol. 9.

(b) *Ante*, vol. i. 612; 4 Barn.

(c) 2 Barn. & Adol. 740.

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# CASES IN THE KING'S BENCH,

holding by the same person of the offices of justice of the peace and select vestryman, we must give effect to the words of the act.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., con-  
curred.

Rule absolute.

## CONNOP v. YEATES.

Bills and notes having more than three months to run, by which more than 5l. per cent. interest is secured, or which are discounted on usurious terms, are by 3 & 4 Will. 4, c. 98, s. 7, rendered available securities for all purposes, for the whole amount for which they were intended to secure, includ-

THE defendant being indebted to the plaintiff for goods sold, accepted the plaintiff's drafts at three months date for the price of the goods, together with interest, at rate considerably exceeding that of 5l. per cent. per annum. The bills not having been paid when due, the plaintiff arrested the defendant for the amount. Whilst in prison under the arrest, the defendant gave a warrant of attorney to confess judgment for the full amount of the bills, with interest at 5l. per cent. Judgment having been entered up, *Platt*, for the defendant, obtained a rule nisi to set aside the warrant of attorney and judgment.

*Erle* now shewed cause. The question as to the validity of this warrant of attorney, depends entirely upon the construction to be put by the Court upon 3 & 4 Will. 4, c. 98, s. 7 (a). The effect of this enactment is, to render liability of any party to any bill of exchange, or promissory note, by reason of the prevention

bills of exchange or promissory notes, payable at or within three months after the date, given for a debt and usurious interest, or which having no more than three months to run, have been discounted upon usurious terms, available securities for the full amount for which they purport to be drawn; and if that be so, it follows that a warrant of attorney subsequently given to secure the amount of such bills or promissory notes, and legal interest from the time when it became due, is also a valid security.

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*Platt and Ball contra.* The Court will be disposed to construe this clause with strictness. The protection given by it must be confined to *bills* and *notes* alone. If an action had been brought on the bills in this case, it is clear that usury would have been no defence; but if a party is not content with the security of a bill or note, and takes a bond, mortgage, or warrant of attorney, for the amount of the bills, such substituted security is affected by the usury laws, and cannot be enforced. There is a very good reason why *negotiable instruments*, which pass by transfer or indorsements, should be protected; but the reason does not extend to *other securities*. If the legislature had intended to extend the same privilege to other instruments, even when substituted for bills or notes made available by this enactment, they would have expressly enacted that it should be so. The act only prevents the bills and notes from being held void, as they otherwise would have been. It was not intended that the usurious interest should be recoverable; and therefore a warrant of attorney given to secure the amount of the bill, is given to secure a legal debt and usurious interest. Should the Court hold that a warrant of attorney may be substituted for bills upon which

spectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture;

anything in any law or statute relating to usury, in any part of the United Kingdom, to the contrary notwithstanding.

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usurious interest is taken, they will virtually abolish the usury laws; as they will lay open a path by which those laws may, with the greatest facility, be evaded.

Lord DENMAN, C. J.—If this case were not within the act, the section would be nearly nugatory. The section provides, that the liability of any party to a bill of exchange or promissory note, payable within three months, shall not be affected by reason of any statute or law in force for the prevention of usury. This is the liability of a party to bills of exchange within the protection of that act. If we were to say that a warrant of attorney given to secure the amount of these bills, was not within the clause, we should be deciding, that the liability of the party is affected, by reason of the interest taken upon those bills exceeding the ordinary rate of interest.

The other judges concurring,

Rule discharged.

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LEESON v. SMITH.

In order to take a case out of the statute of limitations a payment of 12s. as interest money was proved:—  
 This does not justify a verdict finding a debt of 13l. 16s.

A verdict for nominal

damages only could upon this evidence have been sustained, *semble*.

Where, upon shewing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the Court will make the rule absolute, unless the parties consent that the damages shall be reduced.

**ASSUMPSIT** for money lent, and interest. By the particulars annexed to the record the money (15l. 12s.) appeared to have been lent more than six years before action brought, and credit was given for two payments of interest within the six years. Pleas: 1st, the general issue; 2nd, *actio non accrevit infra sex annos*. At the trial before the under-sheriff of Derbyshire, 1 September, 1834, the plaintiff's niece gave the following evidence:—"The plaintiff sent me, in September, 1829, to ask him for his interest money;

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I delivered the message to the defendant. He gave me 12s.; I gave the 12s. to my uncle." On cross-examination the witness said, that she merely asked the defendant for her uncle's interest money, and that the defendant did not tell her any thing about it. *John Leeson*, the plaintiff's brother, gave evidence as follows:—"I met the defendant last Christmas; I said, "*Thomas*, my brother *James* wants to see you, he begins to think you long." The defendant said: "I should have been there before now if I had any thing to come with, but times are hard with me. I was rearing a beast towards it, but I have had the bad fortune to lose it." This was the whole of the evidence for the plaintiff. It was contended on the part of the defendant that there was no evidence to go to the jury of the existence of any debt, and that the plaintiff ought to be nonsuited. The under-sheriff told the jury that there was no distinct proof of any debt,—that *John Leeson's* evidence was inadmissible to take the case out of the statute of limitations,—but that they might consider how far the payment of the 12s. for interest, afforded an inference that there was a then existing debt. The jury found a verdict for the plaintiff for 13*l.* 16s. In the course of this term, *Hughes* obtained a rule nisi for a nonsuit or a new trial, on the ground of misdirection, and of the verdict being against evidence.

*N. R. Clarke* now shewed cause. The evidence was sufficient to take the case out of the statute, since it was an admission of a debt upon which interest to the amount of 12s. was due.

*Hughes* contra. It lay upon the plaintiff to take the case out of the statute. The evidence was not sufficient for that purpose. The evidence of *John Leeson* was inadmissible; for by Lord *Tenterden's* act (a), every acknowledgment or promise, to take a case out of the statute, must be in writing and signed by the party chargeable thereby:

(a) 9 *Geo.* 4, c. 14, s. 1.

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The evidence of the first witness was too vague and uncertain to be left to the jury. Every acknowledgment, to take a case out of the statute, ought to be an admission of the existence of a certain amount of debt,—that amount to be either specified or to be capable of being clearly deduced by calculation. Supposing the 12s. to have been paid in respect of a debt really due, yet as neither the rate of interest, nor the time in respect of which it was due, was mentioned, the jury had no data from which to calculate the amount of the debt. But there was *no* admission of *any* debt being due; for the expressions “my uncle’s interest money,” might merely mean that the defendant had money to pay over to the witness’s uncle, which he had received as his *agent*. Upon such uncertain evidence, the under-sheriff was not warranted in leaving the case to the jury.

Supposing it should be held that there was in this case a sufficient acknowledgment of a debt of some *unascertained* amount, the plaintiff could be entitled at most to nominal damages only.

LORD DENMAN, C. J.—It is clear that the verdict is at all events for too much : we cannot however *reduce* the damages without the *consent* of both parties, and therefore the rule must be made absolute for a new trial. It must be understood that we give no opinion as to the admissibility of the evidence of *John Leeson*.

LITTLEDALE, TAUNTON, and PATTESON, Js. concurred.

Rule refused.



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## ROBINS v. CRESSWELL.

A Rule had been obtained under the compulsory clause in the Lords' Act (33 Geo. 3, c. 5,) to bring up the defendant that he might deliver into Court a schedule of his estate and effects, and duly assign the same, for the benefit of the plaintiff and all persons at whose suit he might be charged in execution. The defendant was brought up on the 9th November, having been charged in execution at the suit of the plaintiff *Robins*, for 253*l.* 5*s.*, with interest on 250*l.* from the 19th November, 1830, to the day of payment, and 16*s.* for writ, besides &c. The 16th section of the 32 Geo. 2, c. 28, enacts, that if any prisoner "charged in execution for any debt or damages not exceeding the sum of one hundred pounds, *besides costs of suit*, shall not make satisfaction" to his creditors, he may be brought up and compelled to assign his estate and effects. By the 33 Geo. 3, cap. 5, sec. 2, every creditor at whose suit "any debtor shall be charged in execution of any sum or sums of money not exceeding three hundred pounds, shall have such remedy, by compelling such debtor to deliver up his or her estate and effects for the benefit of his or her creditors, as is provided by the 32 Geo. 2, c. 28, in cases where the sum for which such debtor shall be in execution does not exceed 100*l.*"

To authorize a creditor to bring up an insolvent under the compulsory clause in 33 Geo. 3, c. 5, (the Lords' Act,) the debt, *inclusive of costs*, for which the insolvent is charged in execution, must be under 300*l.*

*R. V. Richards*, on behalf of the defendant, contended that the proceedings were irregular, inasmuch as the debt, costs, and interest, together, exceeded 300*l.*

*W. H. Watson*, contra, contended that the interest could not be taken into account, as no interest was payable on any writ of execution except an elegit, and the plaintiff was ready to waive his claim to interest;—That the costs ought also to be excluded from the calculation, as the true construction of the 33 Geo. 3 was, that the 300*l.* mentioned

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in that statute was merely substituted for the 100*l.* in the 32 Geo. 2; and that by *that* statute the debt was to be calculated, *exclusively* of the costs of suit. [*Patteson*, J. If the plaintiff chooses to indorse his writ for interest, he must take the consequences.]

By the COURT (a).—The words “besides costs of suit” being omitted in 33 Geo. 3, c. 5, it is necessary, in order to bring a party within the statute, that he should be charged in execution for a debt which, *including* the costs, is under 300*l.*

Rule discharged.

(a) *Taunton*, J., *Patteson*, J., and *Williams*, J.—Lord *Denman*, C.J. was not in court.

DOE d. PARKER and others v. GREGORY.

A *wrongful continuation* of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an *adverse possession* as will, under the statute of limitations, create a bar to an entry, or to an action of ejectment.

As, where husband of tenant for life holds over twenty years after her decease.

**EJECTMENT** for a house and land, &c. at Arlingham, on the demise of parties claiming as heirs of *Thomas Rogers*, tried before *Alderson*, B., at the last Gloucestershire assizes.

3 July, 1722. *T. Rogers* devised the Arlingham estate, after several other limitations for life, to *Nathaniel T. Rogers* for life, remainder to *William Rogers*, the son of *Samuel Rogers*, in *tail male*, remainder to the right heirs of the devisor, with power of jointuring to the successive tenants for life.

1797. By a deed of this date, *Nathaniel T. Rogers*, being tenant for life in possession, settled the Arlingham estate on his wife *Mary*, for her life, by way of jointure, under the power.

1798. *Nathaniel T. Rogers* dying, his wife, *Mary Rogers*,

A fine could be levied only by a person having the *freehold* either by right or by wrong. Devise to *A.* for life; remainder to *B.* in *tail male*. During *A.*'s life, *B.* dies, leaving a daughter, *C.*, who also, during the life of *A.*, dies; leaving a son, *D.* *A.* dies. *D.* cannot take.



entered into possession; and in 1799 she married *Charles Vale*, who, from that time until her death, occupied with her.

1812. *Mary Vale*, late *Rogers*, died, and *Charles Vale* continued in the occupation until his death in 1832.

From the time of the death of *Charles Vale*, the defendant has occupied the premises; but it was not shewn in what character he claimed.

Before 1812, *William Rogers*, the entailee, died, leaving a daughter, *Susannah*, who also died before 1812, leaving a son, *William Rogers*.

1814. *William Rogers*, the grandson of the entailee, died without issue.

This action was commenced more than twenty years after the death of *Mary Rogers*, in 1812, but less than twenty years after the death of *William Rogers*, in 1814.

The defendants gave in evidence a fine with proclamations, levied in 1810 by *Charles* and *Mary Vale*, which did not comprise the whole of the property; and they rested their defence upon two grounds—first, possession for more than twenty years since the death of *Mrs. Vale*, in 1812;—and secondly, the fine.

On the part of the plaintiff it was contended, that the possession was *not adverse*, and that therefore the fine had no operation, nor was the statute of limitations a bar to the plaintiff, even supposing his lessor's right to have accrued in 1812. It was also insisted that the period of twenty years must be calculated from the death, in 1814, of *William Rogers*, who, it was contended, filled the character of "heir male of *William Rogers*, the son of *Samuel Rogers*," at the death of *Mary Rogers*, in 1812. The learned judge was, however, of opinion that there had been an adverse possession ever since the year 1812, and that therefore the right of entry was barred by the statute of limitations. His lordship on this ground directed that the plaintiff should be nonsuited, but gave leave to move to set that nonsuit aside, and to enter a verdict for the plaintiff.

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*Talfourd*, Serjt., now moved accordingly.

I. Assuming that the plaintiff's title accrued in 1812, on the death of *Mrs. Vale*, the first question is, whether the claim was barred by the statute of limitations. That depends upon the circumstance whether the possession of *Mr. Vale*, subsequently to 1812, was adverse; because if the possession be not adverse, the statute has no effect. [*Taunton*, J. There are many cases in which the statute of limitations will run, notwithstanding that the possession is *not adverse*.] In *Reading v. Rawsterne* (a) it is laid down, that the statute of limitations is no bar to an ejectment, unless the lessor of the plaintiff, or some one under whom he claims, has been actually *disseised*,—and that it is not necessarily a disseisin to take the profits of an estate without right. [*Taunton*, J. The text in *Salkeld* is—actually *ousted* or disseised.] In this case there was no disseisin or ouster of the party entitled, as *Mr. Vale* originally entered rightfully, and only *continued* in possession wrongfully. In *Doe v. Perkins* (b) it was held, that in order to constitute a title by *disseisin*, there must be a wrongful *entry*, and that a mere wrongful *continuance* in possession, where the original *entry* was lawful, was not a disseisin. *Williams v. Thomas* (c) establishes the same position.

II. *William Rogers*, the grandson, lived until within twenty years of the commencement of this action.

Upon the death of *Mrs. Vale*, *William Rogers*, the son of *Susannah Rogers*, was entitled to the estate in tail male. Until his death, therefore, the reversion of the heirs of the testator did not vest in possession. [*Taunton*, J. The estate was limited to *William*, the son of *Samuel Rogers*, in tail male. How could *William Rogers*, the son of *Susannah*, claim through a female?] *William Rogers* answered the description of heir male at the time of the death of *Mrs. Vale*. [*Per Curiam*. *William Rogers* could not claim through a female.]

(a) 2 Lord Raym. 830; 1 Salk. 248; *Redding v. Royston*, 1 Com. Rep. 123.

(b) 3 Maule & Selw. 275.  
(c) 12 East, 141.

III. There is one other question arising out of this trial. The fine levied by Mrs. *Vale* was a fine levied by a jointress, and was therefore altogether void. [Lord *Denman*, C. J. There has been an adverse possession, though not such an adverse possession as amounts to a *disseisin*. *Taunton*, J. In *Doe v. Perkins* the question was as to the operation of the statute of fines. A party, to levy a fine, must be in possession of the freehold, by right or by wrong; and where a person comes in by right, there must be a *disseisin* before a *stranger* can effectually levy a fine. There it was held, that there had been no *disseisin* or wrongful entry; but that case does not apply to the present.]

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Lord DENMAN, C. J.—We will consider the first question which has been presented to the consideration of the Court.

*Cur. adv. vult.*

Lord DENMAN, C. J., in the course of the term, delivered the judgment of the Court as follows:

The other points moved by my brother *Talfourd* were disposed of by the Court; but we wished to consider whether he was entitled to a rule on the ground that there had been no *adverse possession* for twenty years. The fact was, that the defendant and *Vale* had been in possession for a longer period, from the death of *Vale's* wife; but *Vale* came in originally in his wife's right, and had not directly ousted the rightful owner, but merely continued where he was, to the exclusion of that owner. A case of *Reading v. Rawsterne* was mentioned; but in that case, though an actual *disseisin* is declared necessary, those words must be taken with reference to the subject-matter, and are there contradistinguished from the mere perception of rents and profits in the case of joint-tenants. But in *Doe d. Burrell v. Perkins*, the Court was of opinion that a fine levied by a person who was in possession, under the same circumstances as the defendant here, operated nothing, because

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he came in by title, and had no freehold by disseisin; and it was argued that here *Vale* was also to be considered as having entered rightfully, and as having committed no disseisin. We are however of opinion, that though this may be so for the purpose of avoiding a fine, it cannot prevent *Vale's* possession from being *wrongful* from the very hour when his interest expired by his wife's death. It is clear that he might have been immediately turned out by ejectment. We think therefore that the continuing this possession by *Vale* and the defendant, for twenty years, entitles the defendant to the protection of the statute of limitations, and that this action has been brought too late.

Rule refused.

Ex parte the Inhabitants of CARLTON HIGH DALE.

The Court will not grant a mandamus requiring the justices at sessions, to direct the putting in suit of a bond given by a high constable for the due performance of his office,—for the purpose of procuring reimbursement to a parish upon which the high constable has levied excessive rates in disobedience of an order of sessions.

**ALEXANDER** moved for a mandamus to the justices of the North Riding of the county of York, in sessions assembled, and to their clerk of the peace, commanding them or him to put in force a bond, given to the clerk of the peace by the high constable of a wapentake within the riding, for the due performance of his duty as high constable.

In 1825, the Court of Quarter Sessions directed the county rate to be collected according to a certain scale; but the high constable disobeyed that order, and has ever since collected the rate according to a scale of his own. The result has been, that the inhabitants of Carlton High Dale have, during the intervening period, paid upwards of 300*l.* more than the legal rate. Upon the circumstance being discovered, an application was made to the quarter sessions, to enforce the bond, and out of its proceeds to reimburse the inhabitants. A discussion arose, but, ultimately, the Court resolved not to enforce it. The object of the present application is to compel them to do so. By the 12 *Geo.* 2, c. 29, for the more easy assessing and

collecting the county rates, the sessions are empowered to make one general rate or assessment in lieu of the separate and distinct rates that were previously laid; and the high constable is empowered to receive the proportion payable by each parish, from the churchwardens and overseers. In case of his neglect or refusal to demand and levy in the mode there prescribed, the sessions have power to commit him to prison. By the 55 Geo. 3, c. 51, passed to amend the act last cited, the justices in sessions assembled are empowered to make a fair and equal county rate (whenever circumstances appear to require it), according to a certain pound-rate to be from time to time fixed and publicly declared by them. They are also, by section 19, authorized and empowered to take good and sufficient security from the high constables employed in collecting and levying the rates. The bond in question was the security taken under the latter statute; and it is submitted that it has been forfeited, and ought to be put in suit for the benefit of the inhabitants of Carlton High Dale. [*Williams, J.* Has there been any request to the clerk of the peace to enforce the bond? Non constat, but that the clerk of the peace will put it in force.] The affidavits do not state such a request (a).

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By the COURT.—Then the application is premature.

*Alexander*, on a subsequent day, renewed the application, upon an affidavit that the clerk of the peace had, on demand, refused to put the bond in force. [*Taunton, J.* What act of parliament imposes this duty on the county?] There is no duty expressly imposed by act of parliament, but there is a duty by necessary implication. Unless this

(a) *Quere*, whether the inhabitants of Carlton High Dale should not have offered to indemnify the clerk of the peace; and whether, upon such offer, the clerk of the

peace would not have been bound to sue,—as having taken the obligation in trust for the parties who should be damaged by the misconduct of the high constable?

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bond can be put in suit, it is worse than useless, since it holds out a delusive remedy. The same act which directs this bond to be taken, necessarily presupposes it to be *available*. If it be not so, the inhabitants of the district are without redress. They cannot *appeal*, either under the 12th section of 12 *Geo. 2*, c. 29, or the 14th section of 55 *Geo. 3*, c. 51; for neither of those clauses contemplates a case like the present. Nor can they *individually* bring an action against the high constable, so as to obtain complete redress, inasmuch as the statute of limitations would be an answer to a part of their demand. Indeed it may be doubted whether such an action is maintainable at all. The case therefore falls within the established rule that, where there is a wrong without a specific remedy this Court will interfere by mandamus. [Taunton, J. Suppose the plaintiff nonsuited in such action, who is to pay the costs?] They may be paid out of the county rates. In *Rex v. The Inhabitants of Essex* (a), it was decided that, if a fine be imposed on a county which the justices at sessions think illegal, they may defray, *out of the county stock*, the expenses of litigating the question. The language of Lord Kenyon there extends the literal force of the decision. He states generally that "wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county purse." Independently of that authority, the 6th section of 12 *Geo. 2*, c. 29, shews that the county rates are liable to the alleged costs. The justices at sessions are thereby empowered to apply the rates "for the uses and the purposes of the said recited acts, and for any other uses and purposes to which the public stock of any county, riding, division, or liberty, is or shall be applicable by law."

(a) 4 T. R. 591.

The present purpose is as much within the spirit of that clause (which, according to *Buller*, J. in the case cited, ought to receive a liberal construction), as the purpose which gave rise to the decision in *Rex v. The Inhabitants of Essex*. [*Taunton*, J. There, the judge of assize had fined the county, and the whole county were interested. The objection here is, that there is no duty on the county. *Patterson*, J. You want to tax the county for the benefit of a few individuals.]

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Lord DENMAN, C. J.—We cannot order the magistrates in sessions to do that which may occasion costs, for which they have no means of reimbursing themselves.

*Per Cur.*

Rule refused (a).

(a) The 55 *Geo.* 3, c. 51, s. 19, is silent as to the party to whom the security shall be given. Here, it appears to have been in the form of a bond to the clerk of the peace. But unless the obligee,

whoever he might be, were compellable to sue by an order of sessions, the mandamus prayed for would be to require the justices to do a nugatory act. *Vide supra*, 313, note; *pots*, 394.

#### BURTON v. PLUMMER.

**ASSUMPSIT** to recover the balance of an account. The cause was tried before the Secondary of London, by virtue of a writ of trial. The only witness examined was the clerk to the plaintiff, who, after refreshing his memory by entries made in his master's ledger, swore to the delivery of a quantity of goods. Upon cross-examination the witness stated, that the entries in the ledger were not made at the time when the goods were delivered, nor made by the witness himself, but by the plaintiff. He further stated, that at the time of the delivery of the goods, he made an entry

Held, that a clerk might refresh his memory as to the deliveries of goods, by looking at entries made in his presence by his master, in a ledger, from entries made by the clerk in a waste book,—such entries in the ledger having been checked by the clerk while the facts were fresh in his recollection,—and that the waste book need not be produced.

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of such delivery in the ticket or waste book (which was not produced) as to the *weight* only of the goods; that on the same day the entries were copied out of the ticket or waste book into the ledger by the plaintiff, in the presence of the witness, and the price added; that the witness checked them on the same day, and saw that they were correct; that the entries in the ledger were made after the goods had gone out, but at a time when the witness had a perfect recollection of the several items. The witness being unable to prove the delivery of any goods without looking at the ledger, the Secondary refused to receive his evidence, and stated, that unless the plaintiff consented to be nonsuited, he must direct the jury to find a verdict for the defendant. The plaintiff consented to be nonsuited. In the early part of the term, *Erle* obtained a rule nisi to set that nonsuit aside, and for a new trial.

*W. H. Watson* now shewed cause. The waste book in which the entry was originally made by the witness was not produced. The entry in the ledger was merely a copy from the waste book, and was not made by the witness. It is clearly established that a witness cannot refresh his memory by means of a copy of a memorandum made even by himself. In *Jones v. Stroud and wife* (a), which was an action for slander, the witness who proved the words, read them from a paper which he acknowledged to be a copy of an original memorandum. He said that he made the memorandum very near the time when the words were spoken, and the copy about six months after. The original paper could not be found. *Best*, C. J. held that the witness had no right to refresh his memory by a copy. *Doe d. Chursh v. Perkins* (b) also determined that a witness cannot refresh his memory by means of a copy of a memorandum.

*Erle*, in support of the rule. A witness may, for the purpose of refreshing his memory, refer to entries in a book,

(a) 2 Carr. & Payne, 196.

(b) 3 T. R. 749, *ante*, 205 -



although he did not write them himself, provided he examined the entries in that book from time to time, after they were written, and whilst the facts were fresh in his recollection. For this, *Burrough v. Martin*(a) is an authority. In *Henry v. Lee* (b), it was determined that a witness may refresh his memory from a document not written by himself. [*Patteson, J.* Are not those cases distinguishable, on the ground that there the witness had not made any entry himself?] The witness in this case refreshed his memory by the same sort of memorandum as that with which *La-roche* refreshed his memory in the *Duchess of Kingston's case*(c). In *Tanner v. Taylor*, (which is cited in *Doe v. Perkins*), the witness attempted to refresh his memory from a copy of the day-book, and it was said, that "if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it." [*Patteson, J.* If the witness could swear to the delivery from recollection, I do not see how he could want the memorandum. *Doe v. Perkins* only decided that the original memorandum must be produced.] *Tanner v. Taylor* is merely cited to shew, that under certain circumstances a witness may refer to a memorandum made by another. [*Taunton, J.* The memorandum must carry about it some marks of authenticity.] The entry in the ledger was in fact an original memorandum, and not a copy from the waste book. The entry in the ledger being written in the presence of the witness, and afterwards checked by him, was as authentic as if it had been made by him.

**Lord DENMAN, C. J.**—It is quite clear that the Secondary was mistaken. The book referred to was not a copy. It contained an entry, made in the presence of the witness, stating a fact which had occurred so recently, that the witness could not be mistaken as to the accuracy of such statement. He might therefore look at the entry to refresh his memory.

(a) 2 Campb. 112.

(b) 2 Chitty's Rep. 124.

(c) 11 State Trials, 255; 20 Howell's State Trials, 355.

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BURTON  
v.

PLUMMER.

TAUNTON, J.—It appears that the witness, on this and every other evening, read over the entry in the ledger with the original entry, and checked it. If he did that, the entry read by him was the same as if he had made it himself.

PATTESON, J.—On the last ground, I concur. I protest, however, against the doctrine, that a copy of a memorandum, made by a witness, may be made use of to refresh his memory. The rule that the best evidence must be produced, applies to a memorandum to refresh the memory of a witness as well as to every thing else.

Rule absolute (a).

(a) See *Maugham v. Hubbard*, 2 M. & R. 5; 8 B. & C. 14.

LEWIS and Wife v. HOOPER.

An annuity deed, the memorial of which does not set forth with precision the form in which the consideration was paid, is void.

The inaccuracy of a statement in the memorial may be brought before the Court by affidavit, as a ground for setting aside the securities.

IN Trinity term a rule nisi was obtained by *Hunfrey*, to set aside an annuity deed, on two grounds; one of which was, that part of the consideration money having been paid in notes of a provincial bank, they were falsely described in the memorial. The memorial described this part of the consideration to have been paid in notes of the Governor and Company of the Bank of England. The affidavits disclosed the following circumstances:—

*Hooper*, in consideration of 500*l.*, by indenture, bearing date the 21st June, 1828, granted an annuity to the plaintiffs of 56*l.* 19*s.* 7*d.*, for 99 years, if *J. L.* (the wife) should so long live. The consideration money was not paid in bank notes, but in the following manner:—54*l.* in notes of a Worcester bank; 46*l.* was deducted by the attorney who prepared the deed, for his charges; and for the remaining 400*l.* a note was given by the grantee, payable one week after date at Messrs. *Curtis, Roberts & Co.* which was dishonoured; and afterwards a cheque for that amount, on *Berwick & Co.*, bankers, Worcester, was given

and duly paid. Within a year after the making of the indenture, the grantee repurchased one-half of the annuity for 250*l*.

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*R. V. Richards* now shewed cause. This is an application founded on the 6th section of 53 Geo. 3, c. 141, which authorizes this Court, in certain cases, to order a deed, whereby an annuity is granted, to be cancelled, and the judgment, if any has been entered, to be set aside. This is an application to the discretion of the Court. It is made when nearly six years have elapsed, and after a part of the annuity has been repurchased by the grantor. *Barber v. Gamson* (a), *Cook v. Tower* (b), and *Girdlestone v. Allan* (c), all establish that the 6th section gives the Court a discretionary power. But if the Court does set aside the deed, they will at all events impose terms. In *Mootham v. How* (d), the attorney for the grantor, at the time of the payment of the consideration money, had kept an unreasonable part thereof for the expense of the deed; and it was held that this was no ground on which the Court would set aside the annuity; and in that case it was said, that the time of the statute of limitations having passed, gave the parties a quietus. *Gorton v. Champneys* (e), *Williamson v. Gould* (f), *Henry v. Taylor* (g), *Calton v. Porter* (h), *Jones v. Silberschildt* (i), *Finley v. Gardner* (k), are all cases where the Court thought right to impose terms.

*Humfrey*, in support of the rule. Length of time is certainly not a quietus to the parties, as in *Drake v. Rogers* (l)

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|--------------------------------|-------------------------------|
| (a) 4 Barn. & Alders. 281.     | 588.                          |
| (b) 1 Taunt. 372.              | (h) 2 Bingh. 370; 9 B. Moore, |
| (c) 2 Dowl. & Ryl. 150; 1      | 703.                          |
| Barn. & Cressw. 61.            | (i) 4 Bingh. 26; 12 B. Moore, |
| (d) 7 Taunt. 596.              | 113.                          |
| (e) 1 Bingh. 287; 8 B. Moore,  | (k) 9 Dowl. & Ryl. 207; 6     |
| 304.                           | Barn. & Cressw. 165.          |
| (f) 1 Bingh. 234; 7 B. Moore,  | (l) 2 Brod. & Bingh. 19; 4 B. |
| 319.                           | Moore, 402.                   |
| (g) 3 Bingh. 177; 10 B. Moore, |                               |

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an annuity deed was set aside after a lapse of eleven years. The memorial in this case does not truly set forth the mode in which the consideration money was paid; and this is a fatal objection to the deed. The affidavit states that the greater portion of the consideration money was paid in a cheque, and not in Bank of England notes, as the memorial states. The 2d section enacts imperatively, that if the consideration is not truly stated, the deed shall be void; *Faircloth v. Gurney* (a). [Lord Denman, C. J. Your affidavit here states that the consideration money is falsely set forth. There the deed shewed it.] The intention of the Annuity Act would be completely frustrated, unless this was allowed to be shewn by affidavit. The most fraudulent transaction might otherwise be valid, as the parties would only have to make the deed correspond with the memorial. In *Mouys v. Leake* (b), the falsehood of the statement in the memorial must have appeared by affidavit.

LORD DENMAN, C. J.—The 2d section of the Annuity Act of 53 Geo. 3, c. 141, requires that within thirty days after the execution of every deed, whereby any annuity shall be granted for one or more life or lives, or for any term of years or greater estate determinable on a life or lives, a memorial—of the date of the deed, of the names of the parties and witnesses thereto, of the person or persons for whose life or lives such annuity shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum to be paid, shall be inrolled in the High Court of Chancery, in the form and to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require. The act then gives a form, and one of the columns of that form is headed, “The considerations, and how paid;” and in the column examples are put, which

(a) 9 Bingh. 622; 2 Moore & Scott, 822. (b) 8 T. R. 411.

shew that the legislature intended that the mode in which the consideration was paid should be set out with exactness. The section then goes on to declare, that if this is not done, the deed "shall be null and void to all intents and purposes." In a variety of cases the Courts have held that the consideration must be set out according to the truth, and that if this be not done, the deed is void. The section leaves nothing to the *discretion* of the Court. If the section only required that the memorial should truly set forth the consideration as stated in the *deed*, we might, by reference to the deed, ascertain whether that was done; but the act requires in general terms, that the memorial shall state the consideration for granting the annuity; and it is impossible to ascertain that fact without having recourse to affidavits. If we were to refuse to admit them for this purpose, the second section would be virtually repealed.

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 LEWIS  
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 HOOPER.

TAUNTON, J., PATTESON, J., and WILLIAMS, J., concurred.

Rule absolute.

PADDON v. BARTLETT and another (a).

CROWDER, in this term, had obtained a rule calling upon Mr. *Hockin*, the plaintiff's attorney, to shew cause why he should not deliver over to Messrs. *Egan and Waterman*, the defendants' attorneys, the postea in this cause, and why he should not pay the costs of this application (b).—

(a) This case was determined on the *last* day of term, contrary to the rule not to hear matters of *law* on the last day of term.

(b) *Quere*, whether the rule should not have been,—to amend the postea according to the learned judge's notes, by entering a verdict for the defendants upon so much of the second issue as related to the first 2½ years, or to the first 14 years of the term.

To debt for 20 years' rent, at 80*l.* a year, upon a lease, the defendant pleaded the statute of limitations; and further as to 1420*l.*, part of the demand, that 17½ years ago the plaintiff by deed assigned his reversion, and that no part of the 1420*l.* had accrued before the assignment: verdict for the plaintiff upon the first issue, and for the defendant upon the second:—Held, that the defendant was entitled to the postea (c).

(c) *Vide tamen post*, 324 note (b).

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DOCK  
v.  
ATLETT.

# CASES IN THE KING'S BENCH,

The rule was obtained upon an affidavit, which stated that the declaration was in debt for 1600*l.*, being 20 years' rent at 80*l.* a year, upon an indenture of lease dated 2nd February 1812, whereby the plaintiff demised to the defendant for 21 years; that the defendants pleaded, first, non est factum; secondly, actio non accrevit infra sex annos; and thirdly, as to 1420*l.* part of the rent for the space of 17½ years ending 2nd February, 1833,—that the plaintiff, by indenture of 30th June, 1815, had assigned all his estate and interest in the demised premises to certain persons, and that no part of the 1420*l.* became due from the defendants; that the plaintiff replied to the second plea, actio accrevit infra sex annos; and to the third, non est factum (a); that the case was tried before Lord Denman, C. J., at the last assizes for the county of Devon, when a verdict was found for the plaintiff upon the first two issues, and for the defendants upon the third;—that the learned chief justice thought that the plaintiff was not entitled to any damages; that Messrs. Egan and Waterman, after the first four days of the term, applied to the associate for the postea, for the purposes of enabling them to tax the defendants' costs, but were informed, that the postea had been delivered to Mr. Hockin, the plaintiff's attorney; that they then wrote to Mr. Hockin, giving him notice that if the postea was not returned in the course of the day to the associate, or sent to their office, they should make an application to the Court upon the subject; that on the same day they gave notice of taxation, and that taxation was attended by Mr. Hockin, who produced the postea with a verdict indorsed for 180*l.* (b) debt, damages 1*s.*, costs 40*s.*; but that t

(a) If the plea had stated an assignment by the defendants, though by deed, the replication would have been "non assignaverunt." Vide ante, vol. iii., 50, note (c); Doctrina Placitandi, 261; 1 Lutw. 662; Cowlishaw v. Cheslyn, 1 Crompt. & Jerv. 48; Stephen on

Pleading, 3d edit. 196, 198.  
(b) This indorsement appears to be informal. Upon the facts, stated in the defendants' affidavit the entry of the verdict should have been, 1st, that the lease was the deed of the defendants; secondly, that the action did accrue with

postea has not been returned to the associate, or sent to the office of Messrs. *Egan and Waterman*.

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PADDON  
v.  
BARTLETT.

*Newman* shewed cause. The defendants established their defence to the extent of part only of the demand. The third plea, (the issue raised upon which was found for the defendants,) applied only to 1420*l.*; whereas the demand, as laid, and as *prima facie* proved by the production of the deed, was 1600*l.* Upon the face of the record the plaintiff has established his claim to the extent of 180*l.*, being the residue of 1600*l.*, after deducting 1420*l.*; and consequently he, and not the defendants, is entitled to the postea.

*Crowder*, *contra*. The plea of the statute of limitations denied any cause of action within six years; but as it appeared by the production of the existing lease that the rent had been accruing annually during the last six years, that issue was of course found for the plaintiff; and had there been no other plea covering the last six years the verdict must have been entered for a debt to the amount of the rent for that period, and damages for the detention of it. But the third plea sets out an assignment of the reversion, 17½ years before its expiration, and the issue on that plea was found for the defendant; consequently the result on the whole record is, that the plaintiff is entitled to no damages, because there was no debt due. Although the plea of the statute was

six years; thirdly, that the assignment was the deed of the plaintiff, —and that the jury assessed the damages of the plaintiff at 1*s.* for the detention of the debt, i. e. 180*l.*, being that portion of the debt demanded which was confessed by the third plea, and which remained unimpugned by the general finding of the jury upon the first and second issues. The jury would be bound in law to find ~~some~~ damages, (post, 324 (a);) and as none were proved, the proper

course would be for the associate to enter a finding of 1*s.* damages. But though the judgment of the Court, upon the finding, would necessarily be—that the plaintiff do recover the sum of 180*l.*, parcel of the debt demanded,—it was irregular to introduce that sum into the *postea*,—as it would form no part of the finding of the jury, any more than in the case of an action of debt on bond, with no other plea than *non est factum*.

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separately pleaded from the other pleas, the effect must be precisely the same as if there had been but one plea, which would have run thus; as to the first 14 years, the statute of limitations; and as to the last six years, the assignment of the reversion 17½ years ago. The true effect of finding in favour of the plaintiff the issue on the plea of the statute of limitations is only that he is entitled for the last six years, all previous rent being covered. But by finding for the defendants on the third issue, the jury have found that as to the last six years and upwards, the plaintiff is not entitled to recover, by reason of the assignment of the reversion. Looking therefore at the whole record, it will appear that the defendants have answered the claim for rent to the whole extent. [*Patteson*, J. Who entered the finding of damages?] It is believed that it was entered by the plaintiff's attorney. [*Taunton*, J. This is an action of debt, and therefore the damages entered are only one shilling; but the associate alone has a right to do that. If the entry of 1s damages (*a*) was made by the plaintiff's attorney, he has done a thing equally wrong in principle as if he had entered 1000*l.* damages.]

Lord DENMAN, C. J.—We are of opinion that the rule must be made absolute to the full extent. The defendants established their defence, and were entitled to the *postea*.

#### Rule absolute (*b*).

(*a*) Without a finding of some damages and costs, the verdict would have been imperfect, (*Ben-  
tham's* case, 11 Co. Rep. 56 a.) and before the passing of 6 *Geo.* 4, cap. 50, the omission could not have been supplied by writ of inquiry, as such a proceeding would have ousted the party of his *attaint*. (Ibid. And see *Cheyney's* case, 10 Co. Rep. 118 b; *Herbert v. Waters*, Carth. 362; *Kynaston v. Mayor of Shrewsbury*, 2 Stra. 1052; 1 Wms. Saund. 195 b).

But as writs of attain are taken away by that statute, sect. 60, it would seem that all defects in verdicts may now be remedied by writ of inquiry, without awarding a *venire de novo*, (and thereby disturbing that which is *well* found) except as to matters directed to be inquired of (as in *replevin* under 17 *Car.* 2, c. 7,) by the jury impanelled to try the issue.

(*b*) This decision is probably in accordance with the *merits* of the case, as they were presented at



nisi prius, but it does not seem to be warranted by the finding of the jury, as disclosed by the defendants' affidavit. If upon the issue joined on the statute of limitations, the plaintiff proved no acknowledgment reviving the *whole* liability, the verdict on that issue ought to have been entered for the plaintiff as to the *last six years*, and as to so much (if any) of the by-gone rent as the defendants had *acknowledged* within six years,—and for the defendants as to the *old rent unacknowledged*. If the first 2½ years' rent had been in the latter predicament, the whole claim would have been barred by the verdict, viz. 2½ years by the statute of limitations, and 17½ years

by the assignment. On the other hand, if the plaintiff proved a distinct legal recognition of the *whole* within six years, the entry of the verdict on the second issue *generally* for the plaintiff, was correct; and in that case the verdict upon the last issue would neither in form nor in substance establish any justification of the non-payment of the 2½ years' rent accruing due before the assignment; the liability in respect of which 2½ years' rent was not otherwise contested by the defendants than by the first plea and that part of the second plea which applied to the earliest portion of the rent,—all which was found against them.

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PADDON

v.

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### MEMORANDA.

*Trinity Vacation, and Michaelmas Term, 1834.*

SIR Charles Christopher Pepys, Knt. His Majesty's Solicitor General, was appointed to the office of Master of the Rolls, vacant by the death of Sir John Leach, Knt.

He was succeeded in the office of Solicitor General by Robert Mounsey Rolfe, Esq.

His Majesty was pleased to appoint William Erle, and Frederick Thesiger, Esqrs. to be his counsel learned in the law; and Matthew Davenport Hill, Esq., received a patent of precedence to rank next after Mr. Thesiger.

On a subsequent day in the vacation, his Majesty was pleased to appoint Cresswell Cresswell, Esq. his counsel learned in the law.

In Michaelmas term, these gentlemen were respectively called upon to take their seats within the bar of the several Courts.

# CASES

ARGUED AND DETERMINED

IN THE

*COURT OF KING'S BENCH,*

IN

HILARY TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

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## MEMORANDA.

1834-5.

Memoranda.

*Michaelmas Vacation, 1834-5.*

IN the course of this vacation, *Henry Lord Brougham* resigned the office of Lord High Chancellor of Great Britain, and was succeeded by *John Singleton, Lord Lyndhurst*, who resigned the office of Lord Chief Baron,

*Sir James Scarlett, Knt.* was appointed to the office of Lord Chief Baron, and was called to the degree of the Coif, and gave rings with the motto

*"Ingenuas per Artes."*

He was shortly afterwards raised to the dignity of the Peerage, by the title of *Baron Abinger*.

*Lord Plunket* resigned the office of Lord High Chancellor of Ireland, and was succeeded by *Sir Edward Burtonshaw Sugden, Knt.*

*Sir John Campbell, Knt.* and *R. M. Rolfe, Esq.* resigned the offices of Attorney-General and Solicitor-General to his Majesty, and were succeeded in their respective offices

by *Frederick Pollock* and *William Webb Follett*, Esqrs. who received the honour of Knighthood.

1834-5.

Memoranda.

His Majesty was pleased to appoint *William Burge*, *Daniel Wakefield*, *Henry John Shepherd*, *Christopher Temple*, *Walker Skirrow*, *John Miller*, *C. H. Barber*, *George Spence*, *Thomas Joshua Platt*, *Fitzroy Kelly*, *Richard Torin Kindersley*, *Edward Jacob*, and *James Wigram*, Esqrs. his counsel learned in the law. They were in the course of Hilary term severally called within the Bar of the respective Courts.

### *Hilary Term, 1835,*

On the night of Sunday the 11th January, being the day previous to that on which the business of the term commenced, Mr. Justice *Taunton* died, at his house in Russell Square. He was succeeded in his office of one of the Justices of his Majesty's Court of King's Bench, by *John Taylor Coleridge*, Esq. Serjeant at Law, who shortly afterwards received the honour of Knighthood.

*Patteson*, J. sat in the Bail Court during this term.

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### DODSON v. MACKEY.

**ASSUMPSIT**, (before the new rules came into operation,) by the drawer against the acceptor of two bills of exchange for 50*l.* each, falling due in October, 1826, and January, 1827. Pleas; the general issue and the statute  
In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you every thing, but all to whom I owe money;" and, "Your account is quite correct; and Oh! that I were now going to enclose you the amount of it." Held, that this was evidence to go to the jury of an acknowledgment, taking the case out of the statute of limitations.

Held, that such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be but, but immediately it is settled, you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise.

Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære*.

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 v.  
 MACKEY.

of limitations. At the trial before Lord *Denman*, C. J. at the last sittings in London, the plaintiff first produced the bills, and proved the acceptance. He then put in two letters, written and signed by the defendant, and dated respectively the 21st April, 1828, and 22d November, 1830, for the purpose of shewing an acknowledgment, so as to take the case out of the statute. The first of these letters was addressed to the plaintiff, and after adverting to a letter received by him from the plaintiff, but which was not in evidence, it contained the following (among other) expressions: "I can never be happy until I have not only paid you every thing, but all to whom I owe money. It is impossible to state to you what will be done in my affairs at present. It is difficult to know what will be best, but immediately it is settled you shall be informed;" and, "your account is quite correct; and, Oh! that I were now going to enclose you the amount of it." The other letter, which was addressed to a Mrs. *W.*, inclosing a remittance on account of a debt due by the defendant to Mrs. *W.*, and in allusion to a debt due to a Mrs. *G.*, and threatened proceedings by that lady, said, "If she will only have patience, I will in time pay every farthing, as also Miss *Dodson*, (the plaintiff,) what I am indebted to her." It being left to the jury to say, whether the letters amounted to an acknowledgment of, and an absolute promise to pay, a debt; and if so, whether the acknowledgment was of a debt to the amount of the bills,—the plaintiff had a verdict for 140*l.*; but the learned Chief Justice gave the defendant's counsel leave to move for a nonsuit, or to reduce the amount given by the jury to nominal damages only.

*Wordsworth* now moved accordingly.

I. The defendant is entitled to a nonsuit. There was no sufficient and unqualified acknowledgment to take the case out of the statute. If there was a sufficient *acknowledgment*, there was no *promise to pay*. And if there was a promise to pay, it was a conditional or qualified promise; a

whereas the promise, as laid in the declaration, was absolute; *Fearn v. Lewis* (a), *Haydon v. Williams* (b), *Brigstocke v. Smith* (c). Even in a case where there was a composition deed, which had been executed by a defendant, and in the recital of which it was acknowledged that there was a debt due from the defendant to the plaintiff,—not, however, specifying the amount,—it was held that there was no sufficient acknowledgment to take the case out of the statute; *Kennett v. Milbank* (d).

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II. Supposing, however, that the letters constitute a sufficient acknowledgment and promise to pay, to take the case out of the statute, still, as there was no *amount* specified, the plaintiff could recover no more than *nominal* damages. *Dickenson v. Hatfield* (e) is upon this point a stronger case than the present.

Lord DENMAN, C. J.—It was left to the jury to say whether these letters amounted to an acknowledgment, and a promise to pay an existing debt, and the jury decided that it was so. My brothers agree with me that it was properly so left. There can be no doubt that the first letter contained a sufficient promise. It was also put to the jury to say, whether the promise was *conditional*, and they decided rightly, as we think, that it was not so. There is no ground, therefore, for entering a nonsuit.

But upon the second point we must take time to consider. The case of *Dickenson v. Hatfield*, which was decided by Lord Tenterden, is certainly very like the present case. I own that I should have had no doubt, but for that case, that the question was for the jury.

LITTLEDALE, J. and WILLIAMS, J. concurred.

Rule for a nonsuit refused.

(a) 6 Bingh. 349; 4 Moore & Payne, 1.

(b) 7 Bingh. 163; 4 Moore & Payne, 811.


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(c) 1 Crompt. & Mees. 483.

(d) 8 Bingh. 38; 1 Moore & Scott, 102.

(e) 5 Carr. & Payne, 46.

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 DODSON  
 v.  
 MACKAY.

On a subsequent day in the term, Lord DENMAN, C. J. said that upon the second point, the Court thought that there ought to be a rule for a new trial, or to reduce the verdict to one for nominal damages.

Rule nisi accordingly.

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FRANKUM v. The EARL of FALMOUTH and others,

Under the Rules of H. 4 Will. 4, "*not guilty*," pleaded to a declaration in *case* for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere *fact* of the diversion, and not its *wrongful* character.

Therefore where the *fact* of the diversion was proved, but the plaintiff failed to shew his right to the water, the Court ordered the verdict, which had been entered for the defendant on the issue of "*not guilty*," to be set aside, and a verdict to be entered for the plaintiff,—but *without* damages.

**CASE.** The declaration stated that the plaintiff was lawfully possessed of a water grist mill, with the appurtenants, and by reason thereof was entitled to have and enjoy a certain watercourse, which, until the diversion of it thereinafter mentioned, was accustomed to flow, and still ought to flow, to the plaintiff's mill, to supply the same with water for working, using, and enjoying the same: But the defendants, contriving &c. higher up the watercourse than the plaintiff's mill, *wrongfully diverted* large quantities of the water of the watercourse from and out of its accustomed and proper course, and away from the plaintiff's mill, and hindered and prevented a large part of the water from flowing along the accustomed and proper course to the mill, and from supplying the same with water for the necessary working, &c. thereof, as the same ought to have done, and otherwise would have done: And by reason thereof, &c.

The defendants pleaded, first, *not guilty*; secondly, that the plaintiff ought not, by reason of the possession of the said *mill*, to have had and enjoyed the benefit

Where, in a declaration in case for diverting a stream, the plaintiff entitled himself to the water as *owner of a mill*, and it appears in evidence that he was entitled *only as owner of land*, the judge refused to amend the declaration by adapting it to the proof.

And the Court refused to give judgment for the plaintiff upon an indorsement of the facts on the postea, under 3 & 4 Will. 4, c. 42.

of the water so diverted; thirdly, that the Earl of *Falmouth* was seised of land contiguous to the watercourse, at a higher part of it than the said mill, and because the water was penned back by the plaintiff, and by reason thereof flowed injuriously through the said lands, the defendants diverted it; fourthly, that the water which was diverted ought not to have run and flowed to the mill. The plaintiff joined issue upon the first, second, and fourth pleas, and as to the third plea replied, that the water was not injuriously penned back by the plaintiff.

At the trial before *Alderson, B.*, at the Berkshire summer assizes, 1834, it appeared that the plaintiff was owner of the land contiguous to the stream, and had, *within twenty years*, erected a water grist mill upon the stream, and had appropriated the water for the purpose of turning the mill. *Talfourd, Serjt.*, submitted that the defendants were entitled to a nonsuit. He admitted that the evidence might have supported the plaintiff's claim, if it had been made by him *as owner of the land*, but that having been made in respect of *the mill*, the declaration was not sustained. The learned judge was of this opinion, but he refused to nonsuit. *Curwood* applied to amend under 3 & 4 *Will. 4, c. 42, s. 23*. His lordship refused to amend, but said that he would indorse the facts (which he directed the jury to find specially) upon the *postea*, in order that the Court might, under the 24th section of 3 & 4 *Will. 4, c. 42 (a)*, give judgment as they should think proper. The jury

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FALMOUTH.

(e) Which enacts "That the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document; and, notwithstanding the finding on is-

sue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

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found that the water was not turned back by the plaintiff injuriously to Lord *Falmouth's* land, and "that the defendants wrongfully diverted divers large quantities of the water of the watercourse within mentioned, from and out of the accustomed and proper course and channel thereof, and also hindered and prevented a large part of the water of the said watercourse from flowing, as it ought to have done, in and along its accustomed and proper course and channel, and from supplying water necessary for the proper enjoyment of the plaintiff's premises as they existed before his mill was erected, and thereby injured the same. And they assessed the damages at 25l." Upon this finding, (which was indorsed upon the postea) the verdict was, under the direction of the learned judge, entered for the plaintiff on the third and for the defendants on the other issues.

*Justice*, in the following term, moved for a rule to shew cause why the plaintiff should not have judgment on the first, second, and fourth issues,—upon the ground, as to the first issue, that by the plea of not guilty nothing but the fact of the diversion of the water was put in issue, and that the fact of diversion was proved; and as to the second and fourth issues, that the variance between the right claimed and the right proved was immaterial to the merits of the case, and that the mis-statement was such as could not have prejudiced the parties in the conduct of their defence. The Court refused to grant a rule as to the second and fourth issues, but granted a rule to shew cause why the verdict should not be entered for the plaintiff upon the general issue, *without damages* (a).

*Talfourd*, Serjt., and *R. V. Richards* now shewed cause. The plea of "not guilty" puts in issue the whole of the

plea nisi was drawn up  
"without damages;"

incorrectly drawn up, for that  
had expressly said that it sh~~ould~~  
be without any damages.



which is necessary to make the act *wrongful*. [*Patteson, J.* If the word “wrongfully,” in the declaration, makes the plea of not guilty put in issue the *right* of the plaintiff, there is an end of our rule of pleading.] Suppose that “not guilty” had been the only plea pleaded in this case (for this is the fairest way of putting the point), and it had turned out in evidence that the defendants had in point of fact diverted the water, but that there had never been any mill, ancient or modern, to which the water had been accustomed to flow,—would the plaintiff have been entitled to a verdict? The question is,—whether the *substantial injury* is the *wrongful diversion* from the mill, or the *actual diversion*. [*Patteson, J.* I do not think that I should, in the case put by you, have received evidence to shew that there was no mill. The plea admits that there was a mill.] The substantial injury and the only ground of action is, *the wrongful diversion*. Unless there be an *injury* done, no action can be maintained for the diversion; and if the declaration had omitted the word “wrongfully,” it would have been bad on demurrer. The plea of “not guilty” puts in issue that which is charged in the declaration. Therefore if it be shewn that the water was not *wrongfully* diverted, the defence is established. [*Patteson, J.* Your argument goes this length, that by reason of the use of the word “wrongfully” in declarations of this sort, it would not be necessary in any such case to plead specially.] Rule 4 of the Rules as to pleadings in particular actions, is in these words: “In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or *wrongful act* alleged to have been committed by the defendant, and *not of the facts stated in the inducement*, and no other defence than such denial shall be put in issue under that plea. All other pleas in denial shall take issue upon some particular fact alleged in the declaration.” Thus the plea is to operate as a denial of the *wrongful act*, and the facts stated in

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the *inducement* only are to be taken as admitted. [*Patterson*, J. The next rule is, "All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*."] Several of the examples given under the preceding rule, and especially that of the general issue, pleaded to an action for a nuisance to the occupation of a house by carrying on an offensive trade, and to an action for slander, are strongly in favour of the argument which is now offered to the Court.

*Curwood* and *Carrington*, *contra*. Nothing is put in issue by this plea but the *mere naked fact* of the diversion. The *wrongful* character of that fact is derived from the inducement, which shews *how* the diversion was *wrongful*; and therefore to hold that the wrongfulness was denied, would be to hold indirectly that the facts stated in the inducement were put in issue. If this be not the effect of the new rules, then the case stands precisely as it did before they were published. The second rule, on "*CASE*," shews that it was intended by the preceding rule that nothing but the *mere fact* which is alleged to be *wrongful* should be put in issue by the plea of *not guilty*. The rule itself says, that the plea shall operate as a denial only of the *wrongful act* alleged to have been committed; which means, the act alleged to have been committed, and which is stated to be *wrongful*.

LORD DENMAN, C. J.—We will confer with all the judges, for the purpose of securing perfect uniformity.

*Cur. adv. vult.*

On a subsequent day in the term

LORD DENMAN, C. J., said—We have conferred with all the judges upon the point reserved, and we all think ~~that~~ the word "*wrongful*" does *not* operate to put in issue

the circumstance of the act being wrongful. The rule must therefore be absolute to enter a verdict for the plaintiff upon the first issue, *without* damages.

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Rule absolute.

## CAPPER and others v. DANDO.

**DANSON** moved for leave to enter up judgment on an old warrant of attorney executed in September, 1825, to secure the retransfer of 560*l.*, 3 per cent. consols, which had been advanced to the defendant by the plaintiffs as trustees under his marriage settlement, in pursuance of an authority contained in the settlement. The retransfer was, according to the defeazance to the warrant of attorney, to be made *on demand*. A demand had been made shortly before the application, but it appeared that the defendant then was, and still continues to be, *insane*.

Where an old warrant of attorney was given to secure the doing of an act (the retransfer of stock) upon demand, the Court refused permission to enter up judgment on proof of a demand made whilst the defendant was *insane*.

*Danson*, in support of his motion. The plaintiffs have, by the demand which they have made, complied with the terms of the defeazance, as far as the defendant's circumstances permitted. A party can in no case set up his insanity as a defence to a just claim. The present is the case of a contract executed—not a proceeding to enforce the execution of a contract—by a lunatic. It is a matter entirely for the discretion of the Court, whether they will allow judgment to be entered up; and it is submitted that as it was manifest that no fraud was contemplated (the application being made on the part of the trustees, with a view to secure the remnant of the defendant's property for the use of his family), the Court will, in this case, hold the demand sufficient, and permit judgment to be entered up. The plaintiffs are willing that it shall, for the greater security of the defendant, be made a part of the rule now

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prayed for, that no process against the *person* of the defendant shall issue.

LORD DENMAN, C. J.—I think that it is impossible for us to grant this rule. Where a *demand* is required as a preliminary to any step towards issuing execution, a demand *in substance* must be made—that is, a demand upon a party capable of understanding the nature of the demand, and of giving a reasonable answer. Here, the demand was addressed to the body of the defendant, when his *mind* was absent. It might as well be said, as it seems to me, that a demand made to a person whilst *asleep* would be sufficient.

LITLEDALE, J.—The Court cannot interfere in this stage. The only course for the plaintiffs is to get the defendant declared a lunatic.

WILLIAMS, J. concurred.

Rule refused.

#### The KING v. The Inhabitants of ST. JOHN, HACKNEY.

A man rented a tenement at 10*l.* a year in A., and occupied for seven months, at the end of which an order for his removal to B. was made, but suspended by reason of his sickness,

ON appeal, an order, whereby *Richard Ingledew*, his wife, and their son, were removed from St. John, at Hackney, to St. Leonard, Shoreditch, was quashed, subject to the opinion of this Court on the following case :

25th March, 1832, the pauper commenced the occupation of an entire house of the yearly value of 18*l.* in Hackney, and resided therein until 4th July, 1833, and paid 6 year's rent.

tenement. Afterwards he was removed to B., but r  
 to reside until the expiration of mo

12th October, 1832, the pauper had become chargeable to Hackney, and an order of justices was made for removing him and his family to Shoreditch. The execution of this order was on the same day suspended by reason of the sickness of the pauper, and remained so suspended until the 13th February, 1833; on which day the pauper and his family were duly removed to Shoreditch, and delivered to the overseers of that parish. On the same day, the pauper, after having been delivered to the overseers of Shoreditch, returned with his family to Hackney, and continued in the occupation and tenure of the same tenement until 4th July, 1833, having held it for a period of sixteen months and upwards.

The question for this Court is, whether (reference being had to the provisions of the 35 Geo. 3, c. 101, 6 Geo. 4, c. 57, and 1 Will. 4, c. 18,) the pauper gained a settlement in the respondent parish under the circumstances herein stated. If this Court shall decide this question in the negative, the order of sessions is to be quashed; if otherwise, to stand confirmed.

*Prendergast* and *W. Clarkson* in support of the order of sessions. The point intended to be submitted to the Court is, whether a settlement is gained by renting &c. a tenement under 6 Geo. 4, c. 57, where part of the occupation was during the suspension of an order for the removal of the party out of the parish in which the tenement was situated. [*Lord Denman*, C. J. Is not the execution of the order an interruption of the occupation, so as to prevent the gaining of a settlement?] In *Rex v. Barham* (a), occupation by the pauper, in the parish of A., under a hiring for a year, had commenced before the making of the order of removal, and the party was removed in pursuance of the order to the parish of B., but returned on the same day to the parish of A., and continued to occupy until the expiration of

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(a) 8 Barnw. & Cressw. 99.

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twelve months from the commencement of his occupation:— it was held that, notwithstanding the order of removal and the execution of it, the *previous* occupation might be connected with that which was *subsequent*, and that the pauper had gained a settlement in A. under 59 Geo. 3, c. 50. That case shows that the actual removal by the pauper in this case, followed by his return on the same day, does not affect the settlement; and the only question which remains is that which has been already stated. By the 35 Geo. 3, c. 101, s. 2, power is given to justices to suspend orders for the removal of sick persons; and it is provided that “no act done by any such poor person continuing to reside in any parish, township, or place, under the suspension of any such order, shall be effectual, either in the whole or in part, for the purpose of giving him a settlement in the same.” It cannot be supposed, however, that the legislature, when they used the expression “no act done” &c., contemplated the case of the continuance of the occupation of a tenement under a yearly hiring. Under 35 Geo. 3 a settlement would have been gained before the making of the order of removal, as forty days’ residence would have sufficed. The suspension of an order is not so strong as the execution of it, yet in *Rex v. Barham* it was held, that even the execution of an order was not sufficient to prevent a settlement from being acquired. The language of the act is, that no act done by any person continuing to reside, &c. A continuing to reside cannot have been contemplated as one of the acts done by continuing to reside.

*Platt*, contra, was stopped by the Court.

Lord DENMAN, C. J.—It is quite clear that the act 35 Geo. 3 is in force for the purposes of this question. The doubt which I stated, as to the interruption of the occupation by the actual removal of the pauper, is set at rest by *Rex v. Barham*. The question is, whether this act

35 Geo. 3 prevents a settlement being gained where a portion of the residence has been during the *suspension of an order of removal*. It is very true that *this* settlement could not be in the contemplation of the legislature, but at the same time when the act provides—that *no act done by any poor person continuing to reside* in any parish under the suspension of an order for his removal, shall be effectual either in the whole or in part, for the purpose of giving him a settlement in the same,—it seems to me that this must apply to any settlement that could be gained even by an after-passed statute. It is very ingeniously argued, that as *residence* is mentioned in the section, it cannot be taken to be any one of the acts intended. Any thing done by the party, however, by which a settlement could otherwise have been gained, or which would otherwise have contributed to the gaining of a settlement, is an *act* done. On that short ground, I think that no settlement was gained in this case, and that therefore the order of sessions must be quashed.

LITLEDALE, J.—The act must include residence. The residence is the same as an act done during the residence.

WILLIAMS J.—It is quite probable that the legislature intended to provide that where an order of removal was suspended, the pauper should be considered as in the parish to which he was ordered to be removed. It was to be a sort of *neutral* residence, as far as the gaining of settlement was concerned.

Order quashed.

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## Ex parte JONES.

The Court will not grant a habeas corpus for the purpose of enabling a party in the custody of the sheriff to go to a county of which he is a freeholder, and vote at a general election.

**MAULE**, on 13th January, moved for a habeas corpus to bring up the body of *Jones*, who was in the custody of the sheriff of Hereford, under sentence of imprisonment for a misdemeanor,—upon an affidavit, which stated that he was a freeholder of the county of Radnor, and was desirous of being allowed to go to give his vote at the poll expected to be taken on the 17th instant.

**LORD DENMAN, C. J.**—We think that there is no foundation for this motion. A similar application was made to me some time ago in chambers, and I then inquired whether there was any precedent for taking such a course, and I found that there was none.

**LITLEDALE, J.**—There is no precedent; and the consequence of granting the rule prayed for, would be to expose the sheriff to an action for an escape; for the party at whose suit the applicant is in custody might dispute the authority of the Court.

**WILLIAMS, J.** concurred.

Rule refused (*a*).

(*a*) As to writs of habeas corpus issued for the bringing up of prisoners for special purposes, see *Brown's Pract. Exch.* 428; 2 *Lill. Pra. Reg.* 3; *Attorney-General v.*

*Fadden*, 1 Price, 403; *Attorney-General v. Hunt*, 9 Price, 147, 4 *Tidd's Pract.* 9th ed. 1073; *Mann*, 1 *Exch. Pract.* 2d ed. *Revenue* Branch, 32, 33.



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UPON appeal, an order for the removal of *Ann Smith*, the wife of *Henry Smith* (who had deserted her), from Harborne, Staffordshire, to East Haddon, Northamptonshire, was quashed, subject to the opinion of this Court upon the following case:—The respondents proved, that *Henry Smith*, being settled in East Haddon, married the pauper on the 11th April, 1831, and afterwards deserted her. The appellants then proved, that on the 4th October, 1821, *Henry Smith* had married one *Elizabeth Meadows*, and, in order to shew that she was alive at the time when he married the pauper, called the father of *Elizabeth*;—who proved that his daughter and *Henry Smith* continued to live together till 1825, when he left her, and she went into Northampton hospital; that he had since received several letters from her, dated from Van Diemens Land; and he produced a letter dated Hobart Town, 17 March, 1831, which he proved to be in her hand-writing. The sessions received the letter in evidence, and quashed the order.

The question for the opinion of the Court is, whether the sessions were justified in presuming that *Elizabeth*, the first wife of *Henry Smith*, was alive at the time of his marriage with the pauper. If so, the order of sessions to be confirmed; otherwise to be quashed.

*Whateley* and *F. V. Lee* in support of the order of sessions. The question, whether the wife was alive or dead, was a question for the sessions; and as there was some evidence, the Court will not set aside their finding. They have found that the wife was alive, upon evidence which was peculiarly for their consideration. The letter was admissible for the purpose for which it was produced. *Hopewell v. De Pinna* (a). (Sir John Campbell stated,

Where, upon a question as to the validity of a marriage between *A.* & *C.*, it appears that *A.*'s first wife, *B.*, was alive in a distant colony 36 days before the second marriage, the sessions or a jury are justified in finding the second marriage to be void.

Neither the sessions, nor a jury, trying an issue as to the validity of such a marriage, are bound to presume the death of *B.*, in favour of the innocence of *A.*, in contracting a second marriage; but may look to the evidence in each particular case.

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that he did not deny the *admissibility* of the letter, and that he relied upon *Rex v. Twyning* (a) as a case precisely in point.) That case is distinguishable from the present. There, the sessions had decided that the first husband was *dead*, and the question was, whether the sessions were right, under the circumstances, in presuming the fact of death. The Court held, that as there were *conflicting presumptions*, namely, that in favour of innocence, and that in favour of the continuation of life, the sessions were *warranted* in giving effect to the former presumption; but that case does not shew that the sessions are *bound* under all circumstances to give effect to that presumption, rather than the other; nor does it shew that if the sessions had come to a contrary decision, the Court would not have supported their finding. The question was one purely of fact for the decision of the sessions, and the Court refused to disturb their finding.

If it is to be taken that in that case the Court considered the question as a question of fact, and expressed their own opinion that under these circumstances death was rather to be presumed,—that case can be no authority here, for the facts are different. There, the first husband had gone to sea, and had not, at the time of the second marriage of the wife, been heard of for twelve months; and, moreover, he had not been heard of during several years which had subsequently elapsed; whereas here, it appeared that the first wife was alive within twenty-six days of the second marriage of the husband. The presumption in favour of the continuance of life, was, therefore, much stronger in this case than in the other.

If *Rex v. Twyning* must be taken to decide that ~~no~~ circumstantial evidence can be admitted to contradict ~~the~~ presumption in favour of innocence, it is submitted that ~~it~~ cannot be supported. It was there contended (and it ~~will~~ be contended here to-day) that the question was the ~~same~~ as it would have been upon an *indictment* for *bigamy*;

(a) 2 Barn. & Cressw. 386.

but such an argument is entirely unwarranted. Whatever may be the rule of evidence under an indictment for bigamy, the rule in this case must be, that the presumption in favour of innocence can only come into operation, when, upon the evidence, there is a serious doubt raised as to the fact of life or death. Here, there could be no such doubt.

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Sir John Campbell and Corbett contrâ. The respondents, by proving that *Henry Smith* was settled in the appellant parish, and that he had, according to the rites of the church, married the pauper, established a perfect *prima facie* case of settlement in the appellant parish; and the onus of proving that the marriage was not valid lay upon the appellants. They undertook to prove that *Henry Smith* had been guilty of bigamy. In proof of such a fact, the mere presumption of the continuance of life is wholly inadmissible. If the appellants had shewn letters of the former wife, which professed to have been written *since* the second marriage, the sessions might from that fact have presumed life. The only evidence that the sessions could legally receive, to contradict the presumption in favour of innocence, was evidence that in point of fact the party *was alive*, and not evidence to shew that it was *probable* that she still continued in life. The evidence necessary here, is exactly the same that would be required upon an indictment for bigamy. This case is not distinguishable from *Rex v. Twining*. Bayley, J. there said, "Are we to presume that *Winter* (the first husband) was then alive? If the pauper had been indicted for *bigamy*, it would clearly not be sufficient. In that case he must have been *proved to have been alive* at the time of the second marriage. It is contended that his *death* ought to have been *proved*, but the answer is, that the presumption of law is that he was not alive, when the consequence of his being so is that another person has committed a criminal act." [Lord Denman, C.J. In that case the sessions had *found* the fact of the *death*.

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It was not necessary, therefore, to raise the general question, whether they were bound to come to such a decision.] It was a presumption of *law* that the first wife was not alive. *Doe d. Knight v. Nepean* (a) shews that even in a case in which no such presumption in favour of innocence exists, there is no presumption of law of a party's being alive at any particular time within seven years after he was last heard of.

Lord DENMAN, C. J.—The question is, whether the sessions were justified in coming to the conclusion, that a party who was proved to have been alive on the 17th March was alive on the 11th April. If that conclusion was right, the marriage was invalid. It appears to me that the evidence was properly admitted, and that the sessions have come to a correct conclusion. There was strong evidence to shew that the party was alive, and there were no circumstances from which a contrary inference of fact could be drawn. The only matter that raised any doubt in my mind, was the doctrine laid down by *Bayley, J.* in *Rex v. Twynning*. In that case, however, the sessions came to a different conclusion—they did not choose to presume that the first husband was alive at the time of the second marriage of the wife; and the Court said, that there was no legal presumption to countervail that finding of fact; but it was totally unnecessary to enter into the question of conflicting presumptions. Lord *Tenterden, C. J.* and *Holroyd, J.* did not happen to be present. *Bayley, J.* seems to have taken up the matter on a principle which certainly was not necessary for the decision of the case. Here, the sessions have said, “the circumstances are of such a nature that we will *not* presume that the wife was not alive.” It appears to me, that nothing could be more absurd than that there should be a presumption of life or death, without reference to the age, circumstances, situation of life, and common habits of the party. Can there be

(a) *Ante*, ii. 219; 5 Barnw. & Adol. 86.

the same presumption as to a party who is 100, and one who is 35?—as to a party who was in good health, when last heard of, and one who was proved to have then had a disorder upon him which was likely, speedily, to terminate in his death? It cannot be. It is altogether a question of fact. The only question that can be, is, whether the sessions or a jury have competent evidence before them. In *Doe v. Nepean*, the question arose much in the same manner. In that case the question was, whether there had been an adverse possession for 20 years, and this depended upon the question—whether a party who went abroad and was never again heard of, must necessarily be taken to have been alive up to the end of seven years after his departure. The learned judge said, that the law was so, and he did not leave it to the jury to say whether the party was alive up to that time. When, however, the case came before the Court, they held that there was no *legal presumption* of the continuance of life until the last period. That is perfectly consistent with our decision in the present case. In *Rex v. Twynning* the point arose exactly in the same manner as in this case. The sessions having found one way, the question was, whether there was any legal presumption against that finding. In every case, the only question that can arise is, whether the evidence was, in its nature, admissible; for otherwise, supposing even that it had been proved that the party was alive on the 10th, and that the marriage had taken place on the 11th, you could not presume that the party was alive at the time of the marriage. The sessions were justified in forming their own opinion upon the facts laid before them; and they have given an opinion from which no person can dissent.

LITLEDAL, J.—I am entirely of the same opinion. The sessions, or a jury, would have been justified in coming to the conclusion, that the first wife was alive at the time of the second marriage. The whole question must depend on the particular facts of the case. You can have no

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positive evidence that the party is alive at the time of the inquiry, unless he is actually produced in Court. According to the argument which has been urged, if it had appeared that the first wife was alive *an hour* before the second marriage, the sessions would not have been warranted in coming to the conclusion at which they have arrived. I cannot assent to such an argument. Some analogy may be drawn from the case of *Doe v. Nepean*; but it is not necessary to say more, as I think that this is quite a clear case.

WILLIAMS, J.—It has been argued, that it lay on the appellants to give satisfactory evidence of the life of *Elizabeth Smith*. Unquestionably that is so. They were to prove that *on the 11th April* she was alive. But then comes the question, is the party restricted to any particular mode of proof? I think not. There was evidence of the life within a month of the second marriage, and that was evidence of the life *on the day*. The death *might* have happened in the interval, but that is a possibility against a probability. It is a question of degree in each case. It is said that *express proof* of the life on the day of the marriage is requisite. If by express proof is meant absolute certainty, what but the production of the party is now sufficient—where the question is, whether the party is now alive? If you are not justified in presuming that a party is alive, because he was alive three weeks ago, would you be so if he were shewn to have been alive within three days or within three hours? It is a question for the jury or the sessions. The sessions have found that the party was alive, and they have acted perfectly right. In *Rex v. Twyning* the question was, whether the sessions had evidence to justify the presumption there raised, and the Court rightly determined that there was such evidence. That all that the Court was called upon to decide in that case Here, there clearly was evidence; and I think that the sessions have come to the right conclusion.

Order confirmed (c)

(a) *Vide post*, 347, n.

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## JORDAN v. JANE FARR and ROBERT FARR.

BY a warrant of attorney, dated 18th May, 1833, the defendants authorized certain attorneys to confess judgment *as against them or either of them*, their executors, &c. Upon an affidavit, which stated that *Robert Farr* was alive on the 2nd November, 1834, and that *Jane Farr* was alive on the 5th January, 1835,

*Ball*, on the 13th of the same month of January, moved for leave to enter up judgment as against the defendant *Jane Farr*. He admitted that he could not ask for leave to enter up judgment as against *Robert Farr*; but he contended that, as by Rule 3 of H. T. 4 W. 4, it was ordered that judgments should be entered of record of the day of the month and year, whether in term or vacation, when signed, and should *not have relation to any other day*,—the foundation of the old practice of requiring that the affidavit should state that the party against whom judgment was moved for was alive on a day within the term, was removed; and the only question was, whether the application was made within a reasonable time (a) after the day on which the party was sworn to have been alive, whether that day was *in term* or not; *Cockman v. Hellyer* (b). He also con-

The Court will now grant a rule to enter up judgment on a warrant of attorney, upon an affidavit shewing that the defendant was alive within a reasonable time (a), whether the day on which he is shewn to have been alive be *in term* or not.

The Court granted a rule moved for on the third day of term, upon an affidavit stating that the defendant was alive on a day six days previously to the commencement of the term.

It being shewn that one of two defendants who had given a *joint and several* warrant of attorney, was alive within a reasonable time, the Court allowed judgment to be entered up as against him alone.

(a) Under the old practice, when it was shewn that the defendant was alive within the term, it was *certain* that a judgment *having relation to the first day of the term*, would be within the authority given by the warrant of attorney. The same certainty cannot now be obtained unless it be shewn that the defendant was alive on *the day* on which the motion is made, the law, for this purpose, making no fraction of a day. If the defendant was not alive on any part of the day on which the judgment

is signed, the judgment, notwithstanding the rule of court empowering the plaintiff to enter it up, would be irregular, as not authorized by the warrant of attorney. A *reasonable time*, therefore, seems to mean a period so recent as to raise so strong a probability of the defendant's being alive on some part of the day on which the motion is made, as to induce the Court to allow the plaintiff to take his chance of his judgment's being regular.

(b) 1 Bingh. New Cases, 1.

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tended, that as the warrant of attorney was *joint and several*, it could not be made an objection that one only of the two defendants was shewn to have been alive within a reasonable time before the making of the application.

*Per Curiam*—

Rule (absolute) granted.

MOODY v. DICK.

The Court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defence upon the merits, and that the verdict passed against him by reason of the negligence of such late attorney.

*Semble*, that the defendant's remedy is by action against the attorney for negligence.

THIS cause came on to be tried before Lord *Denman*, C. J. at the last sittings for Middlesex, when the plaintiff had a verdict.

*Alexander* now moved for a new trial, upon affidavits stating that the defendant had been kept in ignorance of the state of the action, by the attorney whom he then employed; that he had a good defence upon the merits, and that the verdict had gone against him by reason, merely, of the negligence of his late attorney.

The COURT said, that no sufficient ground for depriving the plaintiff of his verdict had been shewn,—supposing the affidavits to be perfectly correct. They suggested, however, upon the same supposition, that the defendant might have a good cause of action against his late attorney.

Rule refused (a).

(a) And see P. 8 *Edw.* 3, fo. 33, pl. 34; Registr. Brev. 113 a; F. N. B. 96 E.; *Anon.* 2 Roll. Rep. 499; *Lutuch v. Pasherante*, 1 Salk. 86; *Anon.* ib. 88, pl. 7; *Robson v.*

*Eaton*, 1 T. R. 62; *Brown Neave*, Wightwick, 122; Bac. *Actions on the case* (F. 2); Dig. *Action on the case for det.* (A. 6); 1 Vin. Abr. 576.



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## The KING v. WILLIAM DUNSFORD.

UPON appeal, a rate for the relief of the poor of the parish of Monkton Farleigh, Wilts, whereby the defendant was rated at 40*l.* for "a stone quarry and land on the Down," was confirmed, subject to the opinion of this Court on the following case :

The appellant is an occupier of a quarry in Monkton Farleigh, from which freestone is obtained. The quarry is not open like a pit, and is approached by a waggon-way extending from the highway about three hundred yards in length, and communicating with an inclined plane at the mouth of the quarry. The land on each side of this waggon-way is in extent about two acres, is applied to the purpose of depositing the rubble and waste materials from the quarry, and is so covered with them as to be incapable of cultivation. A shaft was formerly sunk into the quarry, but was found to be useless, and is now filled up, and the quarry is entered by a *level*. The freestone lies in layers about twenty-four feet thick. Above the layer of freestone is a layer of rubble and ragstone, and beneath the layer of freestone is coarse hard stone. A layer of freestone, when once entered upon, is followed out; the ragstone above (which forms the ceiling) being supported by pillars of freestone left for the purpose. One of the excavations pursues the course of the layer ninety-seven yards under ground. The workmen work by candle-light; they are not common labourers, but men skilled in the business of excavating. It requires three years' service to make what is called a good quarry-man; and though a new workman may be useful at the end of six months, it is not safe to *trust* him. Skill and judgment are necessary in excavating the freestone, particularly with respect to the pillars which are left to support the superincumbent

The mode of working, without reference to the nature of the material extracted, forms the true criterion by which to ascertain what constitutes a *mine*, so as to be exempt from poor-rates.

But whether, according to that criterion, a particular excavation is a *mine or not*, is a question of pure fact to be decided by the sessions, and by them alone.

Where the sessions confirmed a rate as for a *stone quarry*, subject to a case in which the property is called a *quarry*, but in which the mode by which the stone is obtained is stated, and the question submitted to the Court is, whether the excavation described is exempt from the payment of rates,—the

Court sent the case back to the sessions, for them to find as a direct *fact*, whether, upon the criterion afforded by the mode of operation, the excavation is or is not a mine.

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soil. The tools used are pickaxes pointed at both ends, wedges to split the stone from the rock, and an axe for squaring the stone. Rollers and cranes are used to raise the stone into waggons, and sledges to drive the wedges and rollers; saws are also used to cut the stone into ashlar or square pieces. The first process is "picking," which consists in tracing out the layers of freestone; next "jadding," which consists in removing the part of the layer which is loose. The freestone is then split from the rock and squared. Waggon's are backed into the entrance of the quarry down the level underground, to the spot where the stone is brought, and raised by the cranes and rollers. Gunpowder for blasting, and steam-engines, are not used; nor are there any air-passages, or tunnels, nor gate-heads. One passage is kept open until the stone is exhausted, and then another opened. The quarry is worth from 300*l.* to 400*l.* a year. The greater part of the surface of the soil above the quarry is cultivated and occupied by another person, who is rated for it.

The question for the Court is, whether the land and excavation are legally exempt from the poor-rate.

*Follett, S. G.* (with whom was *Channell*), in support of the order of sessions. Both the stone quarry and the land were ratable. With respect to the land, there can be no doubt; and therefore the question will be as to the *amount* for which the rate ought to stand. With regard to the quarry, it will be objected that it is a *mine*, and therefore not ratable, although it is found by the sessions to be a *quarry*. *Rex v. Sedgley* (a), and *Rex v. Brettell* (b), certainly decide conclusively that no *mine* other than a *coal-mine* is ratable; but the question in this case is, whether the particular kind of excavation is a mine or not; and that question is one of *fact* for the decision of the sessions, and not a question of *law* which this Court can entertain. Lord Tenterden, C. J., in *Rex v. Sedgley*, said that the

(a) 2 Barnw. & Adol. 65.

(b) 3 Barnw. & Adol. 424.

question whether the property or limestone, which had been rated, was properly a limestone mine, was "perhaps rather a question of fact than of law;" and in that case the sessions had quashed the rate on the ground that the excavation was a mine, and the Court confirmed the order. In *Rex v. Brettell*, the question submitted to the Court was, whether clay-pits or clay mines were ratable to the poor, and if not, the amount of the rate was to be reduced; and the decision only goes to this,—that a mine is not the less a mine within the principle laid down in *Rex v. Sedgley*, on account of the character of the commodity obtained. The Court have in no case investigated the evidence with a view to decide whether the particular evidence was or was not evidence of a mine. That question is for the sessions. In *Rex v. Sedgley*, the Court laid down the principle as to what is to be considered a mine for the guidance of future sessions, when considering whether a particular excavation is a mine or not; but they leave the decision, under that guidance, to the sessions. Here, the sessions have, by confirming the rate, found that the excavation is not a mine.

Lord Denman, C. J.—to Sir John Campbell. The difficulty which presses upon us is, that the sessions say in terms that this is a *quarry*, and then state facts from which we might perhaps conclude that it is a *mine*. It would, however, be difficult for us to take upon ourselves to decide that question, the more especially as the sessions have called the excavation a quarry. Had not the case better be sent back to the sessions to be re-stated?

Sir John Campbell. In both the cases which have been mentioned, the Court treated the question as a *question of law*.

Follett, S. G. The question is one purely of fact, upon which the sessions are more competent to decide than this Court. This Court has no jurisdiction to entertain the question. But supposing that the Court would examine whether, according to the criterion given in *Rex v. Sedgley*,

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the facts stated in this case shew that this particular excavation is a mine, it is submitted that it will be found that this is not a mine, and that it rather falls within *Rex v. Woodland* (a), *Rex v. Alberbury* (b), and that class of cases.

Sir John Campbell and Bingham, *contrà*. This Court has entertained a similar question in *Rex v. Alberbury*, which was the case of lime works; *Rex v. Woodland*, the case of a slate quarry; *Rex v. Sedgley*, another case of lime works, and in various other cases; and it is of the greatest importance, for the sake of uniformity of decision, that these questions should be decided by the Court. In *Rex v. Sedgley*, there was the same question as here, namely, whether the property substantially described by the sessions is or is not liable to be rated. It is true that in that case the sessions had *quashed the rate*; but no reliance was placed upon that fact, either at the bar or by the Court; but both proceeded upon the special facts, and inquired whether, under the circumstances stated, the property was ratable. In *Rex v. Brettell*, this Court *reversed* the decision of the sessions which confirmed the rate; and thus found, in effect, that the property was a mine, when the sessions had found that it was *not* a mine. In that case, the counsel in support of the order of sessions used the same argument that has been urged to-day; yet all the judges (who delivered their opinions *seriatim*) decided that the facts stated in the case shewed that the clay-pits in question were *mines* within the principle laid down in *Rex v. Sedgley*; and the Court accordingly quashed the order of sessions so far as that order related to the rate in respect of the clay-pits. All the judges expressed themselves bound by the decision in *Rex v. Sedgley*. The rule to be collected from *Rex v. Sedgley* and *Rex v. Brettell* together is, that in every case where the substance (whatever be the nature of that substance) is obtained by the operation of *mining*, the excavation is properly a mine.

(a) 2 East, 164.

(d) 1 East, 534.

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In those cases of lime works (*a*), slate quarries (*b*), and clay pits (*c*), in which the Court decided that the property was liable to be rated, the works were open. It is clearly established that it is the *mode of working*, and not the nature of the *material*, which affords the criterion as to whether this is a mine or not. It is said that the sessions have called this excavation a *quarry*, and that according to the criterion given in *Rex v. Sedgley*, it is not a mine. The sessions have *not* found that it is a quarry, for the question submitted to the Court is, whether the *excavation* is legally liable to be rated. And the argument that this excavation is not a mine, according to the criterion in *Rex v. Sedgley*, is without foundation. That criterion is, in substance, the mode of working, and it cannot be doubted that if a copper or iron mine had been worked in the same manner as this excavation, it would be a *mine*. It is not necessary,—to give an excavation the character of a mine,—that it should be entered by a *shaft*. It is well known that many of the richest mines in England, and those of Potosi, for the most part, are entered, as here, by a *level*, and not by a shaft. The works are equally carried on by the operation of *mining*, whether they are approached by a level or by a shaft. The criterion may be said to be, in one sense,—whether the mode of working is such as requires *skill and experience*; and it is expressly found here that skill and judgment *are* required in excavating, and that it requires a long time to make a man a good workman.

Lord DENMAN, C. J.—*Rex v. Sedgley* cannot be questioned. It was decided by Lord Tenterden, C. J., giving the opinion of the whole Court, and was fully recognized in *Rex v. Brettell*. I therefore think that that authority must be taken to be quite binding. But the question is, whether

(a) *Rex v. Alberbury*, 1 East, 164.

534.

(b) *Rex v. Woodland*, 2 East,

(c) *Rex v. Brown*, 8 East, 528.

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the whole effect has been given to it; that is, whether the sessions, who are to take it as a guide, have done so in this case. The question is rather a *question of fact*. The principle of law derivable from the cases which have been cited is, that the mode of getting, and not the nature of the article, constitutes mine or no mine. But it seems to follow that the application of that principle to the facts of each case must be made by the sessions. If they had said that this is a mine, or that it is not, I should have considered myself bound by their finding. They have not done so:—they have confirmed the rate and called the property a quarry, but have also stated the facts, and put the question whether this excavation is exempt. They have therefore studiously avoided any finding. The answer of this Court is, that we will not decide the question of fact. We can only lay down rules of law. This case must be re-heard, and the sessions must decide whether, —applying the rule in *Rex v. Sedgley* to the facts, either as they now are, or as they may be made to appear on new evidence,—this excavation is a mine or not.

LITLEDAL, J.—*Rex v. Sedgley* and *Rex v. Brettell* have decided that the nature of the *material* is no part of the criterion upon these questions. That is the principle laid down by the Court. The question is a question of fact,—whether the mode of operation shews it to be a mine within the principle laid down, or not; and this question is entirely for the sessions to decide upon. I do not know how the Court, as matter of *law*, are to say whether the mode of operation is such as to constitute the excavation a mine. That question depends on a variety of circumstances. I see no difference between this quarry (for it seems to me to be clear that it is a quarry, though doubtful whether it is a mine) and a common open quarry, except that it is under ground, and approached by a level; and I do not see how we can say, as matter of *law*, that this constitutes it a mine.

WILLIAMS, J.—The rule of law is, that it is not the mineral, but the manner of procuring it, that determines the question. Then it is for the sessions to decide in each case, whether, on applying that rule, they are satisfied that the particular excavation under consideration is or is not a mine.

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The KING v. The Inhabitants of LLANFIHANGEL-  
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AN order of two justices for the removal of *Hannah Thomas* from the parish of Mydrim, Carmarthenshire, to the parish of Llanfihangel-Abercowin, in the same county, was confirmed on appeal, subject to the opinion of this Court upon the following case:—

*Esther Walters*, single woman, in January, 1833, being pregnant of the pauper, was removed by an order of justices to Llanfihangel-Abercowin, and was, together with the order, delivered to one of the overseers of Llanfihangel-Abercowin; she was left there by the overseer of Mydrim; but on the same day returned to her mother's house in Mydrim, under a promise from the overseer of Llanfihangel-Abercowin, made after the departure of the overseer of Mydrim, that a certificate should in a few days after be given to Mydrim acknowledging her to be legally settled in Llanfihangel-Abercowin. She was at the same time told by the overseer of Llanfihangel-Abercowin to go to the parish of Mydrim, and look for a place for herself there until a few days, when she could bring such certificate, and in the meantime to conceal herself from the parishioners of Mydrim. She accordingly returned that day to Mydrim, and concealed herself until the child was born.

The overseer of Llanfihangel-Abercowin did not bring

Where fraud is not expressly found by the sessions, this Court cannot infer it from any state of facts.

But in case where the facts stated were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the Court sent back the case to be re-stated.

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the certificate, nor was such certificate ever after given to Mydrim. In about three weeks after her return, *E. Walters* was, at her mother's house in Mydrim, delivered of the pauper, a bastard, she having directed her mother and sister to conceal the fact of her being there; and three weeks after, the parish of Llanfihangel-Abercowin paid the nurse for nursing the pauper. Upon the discontinuance of such payment, the parish of Mydrim, on 14th September, 1833, by the order of the two justices, removed the pauper (who had become chargeable to Mydrim) from Mydrim, where the pauper then was at nurse with her mother, to Llanfihangel-Abercowin.

Upon the hearing of this appeal, it was, on the behalf of the parish of Llanfihangel-Abercowin, objected, that the two justices who removed the pauper from Mydrim had no jurisdiction to do so, inasmuch as the pauper was under the age of seven years, and at the time with her mother at nurse in Mydrim.

*Chilton*, in support of the order of sessions. It sufficiently appears from the statement on the case, that the mother was settled in Llanfihangel-Abercowin, and that the circumstance of the pauper being born in Mydrim, was occasioned by the *fraud of the officers* of Llanfihangel-Abercowin, in order to prevent the child from being settled in that parish. *Fraud* is not found as a fact; but it is to be collected from the statement. [Lord *Denman*, C. J. It is essential to your case that there should be fraud, and that must be found as a fact by the sessions. It has been decided, a hundred times, that we cannot *infer fraud*, but are to decide only upon the facts stated.] It is hoped that the Court will send the case back to be re-stated. The intention on the part of the sessions to raise the question as upon a finding of fraud, sufficiently appears.

*E. V. Williams*, contra, prayed that the order of sessions might be quashed.



Lord DENMAN, C. J.—It is quite clear that we cannot infer fraud; but we think that upon the whole matter stated there is enough to warrant us in sending the case back to the sessions to be re-stated.

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The KING v. The Inhabitants of the Parish of CARTMEL,  
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AN order, whereby *Robert Armer*, his wife and children, were removed from the township of *Burton, Westmoreland*, to the parish of *Cartmel, Lancashire*, was confirmed, subject to the opinion of this Court on the following case:—

In 1822, *Robert Armer* gained a settlement by hiring and service at East-plain. East-plain was, before the act of parliament and award hereinafter mentioned, part of a salt marsh formed by the gradual retiring of the sea, but occasionally overflowed by the tide; and which salt marsh was part of the waste lands within the parish of Cartmel, and is bounded on the one side by the sea, and on the other by the ancient inclosed lands of the townships of Lower Holker and Lower Allithwaite, both within the parish of Cartmel; but whether East-plain was within, or formed part of either of those townships, or was within or formed part of any of the other five townships hereinafter mentioned in the said parish, no other evidence was given except the local situation thereof as above set forth, and the act of parliament and award hereinafter mentioned. There are in the Parish of Cartmel seven townships, each of which maintains its own poor separately, has a separate poor-rate, and separate overseers. All the lands in the parish of Cartmel, the parish, and although by an award made under the authority of an act of parliament for inclosing the commons &c. in the parish, it is directed that the said waste lands shall contribute in certain proportions to the rates (parochial or otherwise), of each of the several townships within the parish.

An order of removal directed to the overseers of a parish, which has no overseers quâ parish, is bad.

Therefore where a pauper had gained a settlement by hiring and service on waste land within a parish, the remainder of which is divided into townships having separate overseers and supporting their own poor, and which parish, quâ parish, has no overseers or poor-rate, a removal to the parish at large is bad, although it is not shewn that the waste land belongs to any one of the townships of

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(except it be the said salt marsh of which East-plain is a part,) are comprised within one or other of the townships. Whether East-plain itself, or the salt marsh of which East-plain formed a part, is also comprised within one or other of those townships, no other evidence was given except as aforesaid. There are no overseers of the poor for the parish at large, nor have any ever been appointed; neither is there, nor has there ever been any poor-rate for the parish at large, or any parochial funds out of which the poor can be maintained. The notice of appeal against the said order of removal was signed by all the churchwardens and all the overseers of the poor of the said townships respectively, wherein they described themselves as the churchwardens and overseers of the poor of the parish of Cartmel;—and the appeal was entered as that of the churchwardens and overseers of the poor of the parish of Cartmel. The paupers were delivered to the overseer of the township of Lower Holker, with whom they still remain.

By an act of Geo. 3, for inclosing the waste grounds in the parish of Cartmel, it was enacted, that the commissioners should draw up an award, which should specify and direct in what township or division within the said parish, the lands &c. which should be allotted by virtue of that act, should lie or be parcel, and should be charged with and pay all such taxes and assessments as should become due and payable in respect thereof. The commissioners, in 1809, made their award, whereby, after allotting East-plain to certain persons, they directed that it should be subject to the payment of certain specified proportions of all rates and taxes and assessments, parliamentary, parochial, or otherwise, out of the yearly value thereof, *to each of the several townships*. Since the making of this award, the poor-rates have been paid to the several townships within the parish of Cartmel in the proportions named in the award.

The appellants contended, that as East-plain was a part of a marsh, derelict of the sea, and which marsh abutted on the townships of Lower Holker and Lower Allithwaite, it

was situated within one or the other of those townships, and that it lay on the *respondents* to ascertain within which of them it was situate, and to have removed to it accordingly; and that a removal to a *parish* which had no poor-rate and no overseers was bad.

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But the sessions held, that as East-plain, where the paupers gained a settlement, was within the parish of Cartmel, it lay on the *appellants* to show not merely that there was no poor-rate made, nor overseers appointed for the parish at large, but that East-plain was within some one or other of the townships respectively maintaining their own poor, and that, as far as appeared, it might be within none of those townships, although it was within the parish of Cartmel. They therefore confirmed the order.

*Armstrong* in support of the order. The sessions were right in the decision to which they have come. [*Williams, J.* How can an order of removal be made to a parish that has no overseer, and has no rate for the relief of the poor, quâ parish?] There ought to be overseers appointed for this place, and a rate made for the relief of its poor. The 43 *Eliz. c. 2*, directs that overseers shall be yearly appointed for every parish; and the 13 & 14 *Car. 2, c. 12, s. 21*, authorizes the appointment of overseers for the several townships, and villages in large parishes: but where there is a place known to be within a parish, the remainder of which is divided into townships, all maintaining their own poor, and the place in question cannot have overseers appointed for itself, the poor settled upon it must necessarily be chargeable upon the whole parish. [*Williams J.* You say, in fact, that you do not know to which township the paupers are chargeable, and so you remove to the whole parish]. This place is rated to every township in the parish.

*Peel*, contra, was stopped by the Court.

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Lord DENMAN, C. J.—The mere fact of this district being called upon to contribute towards the poor-rates of all the townships, does not shew that poor persons who have acquired a settlement by residence or otherwise within the district, are chargeable to the parish at large. But laying aside that question, it is at all events incumbent on the respondents to shew that the order of removal was directed to a party competent to receive it; and here it is not shewn that the supposed parties to whom it was directed had any existence at all. The order of sessions must therefore be quashed.

LITTLEDALE J., and WILLIAMS J., concurred.

Order of Sessions quashed.

#### REX v. The Inhabitants of FOLESHILL.

A coal mine lying in several parishes is ratable to the relief of the poor in each of those parishes, although the adit and the machinery be in one parish only.

UPON an appeal against a poor-rate for the parish of Foleshill, in the county of the city of Coventry, by which *George Wheilden* was assessed in 525*l.* for a coal mine, engines, and machinery, in his occupation, the sessions reduced his rate to 320*l.*, subject to the opinion of this Court on the following case:

*Wheilden* is the owner and occupier of a coal mine, situate partly in Foleshill and partly in the adjoining parish of Exhall. At the time when the rate was made, he was getting coal partly under Foleshill and partly under Exhall. The pits, engines, and fixed machinery, are in Foleshill alone, in which parish all the coal is brought to the surface. *Wheilden* is assessed in Exhall at 210*l.* for the Exhall part of the mine. The sessions found, that if the parish officers of Foleshill were entitled to rate *Wheilden* for the whole profits of his mine, 525*l.* was a proper sum; but that if they were only entitled to rate him for the profit derived from

the steam engines and other machinery under Foleshill, the assessment ought to be reduced to 320*l*. The question for the Court, is, on which of the two principles the rate ought to be made.

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*M. D. Hill* and *Waddington*, in support of the order of sessions. This mine is ratable in Exhall in respect of that portion of the coal only which is raised from that parish. By 43 *Eliz.* c. 2, s. 1, "*occupiers* of coal mines" are ratable; and it seems clear that the owner of this mine *occupies* a certain portion of it in Exhall. It will be contended on the other side, that the mine must be considered to be locally situate for the purposes of rating, in that parish alone in which the shaft and engines &c. are, and in which the coal is brought to the surface. But this argument appears to be entirely destitute of any foundation. It is now considered that a canal is ratable, not in that parish alone in which the tolls are taken, but *pro rata* in each parish through which the canal passes,—upon this principle, that the land which would otherwise have been ratable to the parish in which it is locally situate, is covered by the canal. If this be the principle in the case of land, *à fortiori* it ought to be so in the case of a mine, where the substance ratable is actually *taken away*. In *Rex v. The Mayor &c. of Bath* (a), it was held that the corporation of Bath, who were owners of reservoirs of water in the parish of Lyncomb, and who conveyed the water by pipes through the city of Bath, where it was consumed, were liable to be rated on their profits, not in Lyncomb wholly, but partly in those parishes in Bath through which the pipes ran, because they occupied land by those pipes in each of such parishes. There have been similar decisions with respect to gas companies.

*Pollock*, A. G., *Amos*, and *Reynolds*, *contra*. In the case *Put* of canals &c. there is an actual occupation of the land

(a) 14 East, 609.


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in the parishes through which they pass. A permission to take minerals from the land of another is a *licence* only, and not an *occupation* (a). Therefore if a man have a mine in one parish, and have permission to go from that mine into a coal field in the adjoining parish, there to get the coals, this is no *occupation* of land within the adjoining parish, any more than a licence to cut timber on the land of another in another parish, is an occupation of land, for the purposes of rating, within such other parish. The mine is in Foleshill, in which parish is situate the *adit* by which access is obtained to the *coal field* or *strata of coal* in Exhall. It is where a particular thing of value in the bowels of the earth first comes *to the light* that it is ratable. The coal is not ratable when lying in the place where nature placed it.—When then does it become ratable? Not when first separated, or when first placed in the tram road or level in the mine, but when first brought to the surface and rendered available for the purposes of man. Suppose a shaft sunk on the sea-shore, and coal raised from underneath the sea, would not the coal be ratable at its whole value in the parish in which the shaft is sunk? It does not appear but that this shaft in Foleshill affords the only possible means of getting at the coal. Therefore it must be taken, that if the owner of the land were deprived of this adit, he would lose the whole value of the mine. This case is rather like that of a mineral spring, which is ratable in the parish in which it is first made available, than any of the cases which have been referred to contra. In *Rex v. Miller* (b) it was held, that the profits of a mineral spring were ratable as part of the *produce of the land in which it came to the surface*. So, the profits of this coal mine must be considered as part of the produce of the land which contains the approach to it. Suppose that it could be shewn that the water of a mineral spring ran underneath another parish before it came to the surface,—would the sessions

(a) Vide *Doe d. Hanley v. Wood*, 2 Barn. & Alders. 724.

(b) 2 Cowper, 619.

be warranted in saying that such other parish was entitled to share in the benefit of the profits of the spring? It may be said that the improbability of any person's being able to discover the subterraneous course of the stream is a sufficient answer to any argument drawn from the analogy of this case; but it must be remembered that in the time when the 43 *Eliz.* was passed, the state of science was such, that it was nearly, if not quite, as difficult to ascertain whether a particular part of a *mine* was in one parish or in another. It may reasonably therefore be supposed that the legislature intended that the mine should be considered to be in that parish in which the coal is brought to the surface. And indeed, at *this* day, it is almost impossible for the parish officers to say how much of the coal is raised from one parish, and how much from another. It appears to have been the opinion of Mr. *Nolan* (a) that the coal was ratable at the *pit's mouth*.

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**LORD DENMAN, C. J.**—This is clearly a coal mine in the parish from which the coal is actually obtained, and it is ratable in that parish. The argument is much too refined which says that the mine can only be in the parish in which the coal is brought to the surface. Suppose a coal mine extended into twenty parishes, and was being worked only in one, and the pit was in one of the parishes, where no work was going on,—could it be rated only in the parish where the pit was situate? As to the difficulty of ascertaining the value in each parish, there is none here stated. The sessions have ascertained it.

**LITLEDALE, J.**—I am of opinion that that part of the coal field which is in Exhall is liable to be rated there. The words in the statute are “coal mines.” Now, is this a coal mine? It has been argued, by the counsel for the respondents, that it is not ratable as a coal mine, unless the

(a) 1 Nolan's P. L. 146.

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apparatus for working it is also in the same parish. I do not agree with them in that. In *Sander's* case (a) it was held, that "if a man hath mines hidden within his land, and leaseth his land and all mines therein, there the lessee may dig for them." If you lease mines, there is no doubt that mines would pass, though no mines were open at the time. The getting of the coal is an operation in the mine. You send men in, and they sever the coals; that is as much a mine as if the whole machinery were in the same parish. As to the spring rated where it comes out, it cannot be rated anywhere else. It is impossible to know through what parishes it comes; whereas there is no difficulty in deciding where the coal is. There might have been more difficulty in the time of Queen *Elizabeth*; but that does not vary the principle. The sessions must rate it in the best way they can. *Rex v. The Mayor, &c. of Bath* (b) is very much like this case. But this is much stronger than the cases of canals, and water-pipes in which the land is used for the artificial purpose of conveying water by machinery. This is exactly as if one would gather wheat from the land above. The sessions have come to the right conclusion.

WILLIAMS, J.—A principal objection made was, that *Whielden* was not in point of law the occupier of a coal mine in Exhall. I think that the whole of this, both that which lay in Exhall and that which lay in Foleshill, might fairly be considered as a coal mine. If that be so, *Whielden* was an occupier, and liable to be rated to some amount or other in Exhall.

Order confirmed—

(a) 5 Co. Rep. 12.

(b) *Supra*, 361.



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## The KING v. ADEY and others.

AN order made by two justices for stopping up an unnecessary highway in the township of Curborough and Elmhurst, in the parish of St. Chad, otherwise Stowe, Litchfield, in the county of Stafford, was confirmed, subject to the opinion of this Court upon the following case:

The appellants were called upon to prove service of the notice of appeal required by the 55 Geo. 3, c. 68, s. 3; when it appeared that a notice in the following form had been given:—(The notice, which was here set out at full length, purported to be a notice of appeal by *Adey* and others, inhabitants of Chorley, Staffordshire, against the above-mentioned order of justices; and concluded as follows:) “And the grounds of our appealing against the confirmation of such order, and proceeding and stopping up the said road, are, that we shall be materially injured and aggrieved by being compelled to go a much greater distance to the next market town from our respective residences, than we should if the road intended to be stopped up as useless and unnecessary were put and kept in a proper state of repair. Dated &c.”

A notice of appeal against an order for stopping up a highway, is sufficient if it state that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair.

It need not expressly state that they are aggrieved by the order.

It was objected by the counsel for the respondents, that this notice was not sufficient, on the ground that it did not state that the appellants were injured or aggrieved by the order. And the sessions being of this opinion, confirmed the order.

The question for the opinion of the Court is, Whether the notice of appeal was a sufficient notice within the third section of the 55 Geo. 3, c. 68.

*Whateley*, in support of the order of sessions, contended, that the notice should have stated in terms, that the parties were aggrieved by the order. For this he cited *Rex v. Justices of Essex (a)*, *Rex v. Justices of West Riding of*

(a) 7 Dowl. & Ryl. 678; 5 Barn. & Cressw. 431.

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*Yorkshire* (a). He admitted that a later case of *Rex v. Justices of West Riding of Yorkshire* (b) was to the contrary.

Lord DENMAN, C. J.—We are disposed to think that it scarcely required an authority to shew that the Court of Quarter Sessions was wrong.

Order of Sessions quashed.

(a) 1 Mann. & Ryl. 547; 7 Barn. & Cressw. 678.

(b) *Ante*, vol. i. 426; 4 Barn. & Adol. 685.

—◆—  
 LOW v. BURROWS.

Where, to an action on a bill of exchange, the defendant pleads want of consideration, and the plaintiff replies, that the defendant had consideration for his acceptance, which consideration he states specifically *under a scilicet*, and then concludes *to the country*, the plaintiff is not bound to prove consideration in the first instance.

**ASSUMPSIT** on a bill of exchange for 36*l.*, drawn by the plaintiff and accepted by the defendant (c). The defendant pleaded as to 20*l.*, parcel of the 36*l.*, that the consideration for his promise in respect of the said sum of 20*l.* was the sale and delivery, by the plaintiff to the defendant, of a certain cow, for 20*l.*, and which cow the plaintiff, at the time of such sale, warranted sound; whereas the cow at the time of the sale and delivery was not sound, but on the contrary thereof was unsound, and shortly after the sale and delivery died of such unsoundness. And as to the residue of the 36*l.* the defendant pleaded, that he never had any consideration for his acceptance, et *hoc paratus est verificare* (d).

Replication: As to the plea of the defendant pleaded as to the sum of 20*l.* parcel &c., that the plaintiff did not warrant the defendant that the said cow was sound, *modo*

(c) The declaration contained other counts, upon which no point arose.

(d) As this plea denied a matter implied contained in the decla-

ration, (vide *Gilbert v. Parker*, 2 Salk. 629, 6 Mod. 158; 2 Wm. Saund. 9 c. n. (14),) *quare*, whether it ought not to have concluded to the country?

et formâ &c.—concluding to the country. And as to the plea of the defendant by him secondly above pleaded, as to the residue of the 36*l.*, that the defendant did receive consideration for the said acceptance therein mentioned, *to wit*, two cows sold and delivered by the plaintiff to the defendant at his request,—concluding also to the country.

At the trial before Lord Denman, C. J. at the London sittings after last term, the plaintiff's counsel merely put in and proved the bill of exchange described in the first count. Ball, for the defendant, contended, that as the plaintiff had in his replication not only alleged that consideration had been given for the bill, but had gone on to state the particular nature of the consideration, viz. the sale and delivery of two cows by the plaintiff to the defendant, he was bound to prove such particular consideration. The Lord Chief Justice was, however, of opinion that the production and proof of the bill was a sufficient *prima facie* case, and overruled the objection. Ultimately, the plaintiff had a verdict for 5*l.*, the jury expressly stating that they found the question of warranty in favour of the defendant, and two payments of 6*l.*, and 5*l.* having been admitted. The Lord Chief Justice refused to give leave to move to enter a nonsuit on the point suggested.

Ball now moved for a new trial. The plaintiff was bound under these pleadings to prove the specific consideration alleged by him in his replication to have been given. A case of *Green v. Armstead*, tried before Alderson, B. at the sittings in London after last Trinity term, was cited at the trial in support of the objection then and now made. In that case, the declaration was on a bill of exchange. The defendant pleaded want of consideration; and the plaintiff in his replication stated that there was a consideration, and set out fully what that consideration was. [Lord Denman, C. J. Was the specific consideration there stated *under a scilicet*?] It was not. That, however, was the only difference between the two cases;

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and there the learned baron compelled the plaintiff (who had contented himself with putting in and proving the bill,) to go into evidence of the *specific* consideration. Mr. *Platt*, who was of counsel for the plaintiff in this case, stated at the trial, that *Parke*, B. had decided otherwise a few days previously. It is hoped that the Court will grant a rule for the purpose of considering fully, whether the consideration thus stated in the plaintiff's replication ought to have been proved by the plaintiff.

Lord DENMAN, C. J.—We should like to look more into the pleadings, before we give our opinion upon the point.

Cur. adv. vult.

On a subsequent day in the term,

Lord DENMAN, C. J. said,—We think that the question, whether the plaintiff was bound to prove the consideration stated, depended upon whether the replication concluded to the *country*, or with a *verification*. We find, upon looking at the pleadings, that the conclusion is to the country, and therefore we think that it was not necessary for the plaintiff to prove the consideration.

Rule refused.

HALL v. MIDDLETON.

Upon a motion for a rule nisi for a new trial of a cause tried before an under-sheriff, **THIS** cause was tried before the under-sheriff of Derbyshire by virtue of a writ of trial; and the plaintiff had a verdict for 15*l*.
 the party making the application should produce a copy of the under-sheriff's notes, verified by affidavit,—or an affidavit stating a refusal by the under-sheriff to give a copy of his notes, and bringing before the Court the facts proved at the trial.

Maule, within the first four days of the term, moved for a new trial. He stated that he was not furnished with a copy of the under-sheriff's notes verified by affidavit, nor with a statement upon affidavit that the under-sheriff had been applied to for his notes and the application refused, (*Mansfield v. Brearey* (a), *Burney v. Morall* (b)); and that he had only an affidavit of the attorney who was present, stating the evidence. Under circumstances which he mentioned to the Court, he requested that they would allow him time to procure the under-sheriff's notes.

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The COURT expressed some doubt whether it was necessary that the under-sheriff's notes should be in Court at the time of moving for the *rule nisi* for a new trial; and whether the statement of counsel should not be received, as in the cases of similar motions after trials before a judge at *nisi prius*; in which case the judge is not called upon to make his report until the *rule nisi* has been granted. The Court, however, under the particular circumstances brought to their notice, stayed the proceedings, in order that an application might be made to the under-sheriff for his notes.

A few days afterwards,

Lord DENMAN, C. J. said—We think that it is proper that there should be some application to the under-sheriff for his notes, and that those notes, if furnished by him, should be produced; and that if he refused to give them, we should have an affidavit stating what was said by him on the occasion, and laying before us the facts proved at the trial. The Court of Exchequer (c) have already decided that such is the course which ought to be pursued; and

(a) *Ante*, III. p. 471; 1 Adol. & Ell. 348 a.
 & Ell. 347.

(b) *Ante*, III. 472 (a); S. C. per Crompt. Mees. & Rosc. 382, ut
nomen Burney v. Mawson, 1 Adol. videtur.

(c) In *Thomas v. Edwards*, 1

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we will adopt the same rule, as we are anxious that the practice should be uniform.

Leave granted to renew the application
 after the first four days of the term(a).

(a) On a subsequent day in the term *Maule* renewed the motion, stating that he was now furnished with a copy of the under-sheriff's notes and an affidavit stating that such copy had been furnished by the under-sheriff to the deponent as a true copy of the notes taken by him at the trial; and the Court granted the rule nisi.



THE KING v. THE JUSTICES OF WARWICKSHIRE.

Where, upon appeal against a conviction under the Vagrant Act, (5 Geo. 4, c. 83,) the sessions confirm the conviction, subject to a case for the opinion of this Court,—a subsequent sessions may, after this Court has affirmed the order of sessions, or after the time for removing the order of sessions has elapsed, without any certiorari having been awarded, issue the necessary process for the apprehension and punishment of the offender according to the conviction.

ONE *Smith*, having been convicted and sentenced to one month's imprisonment, by the Rev. *R. R. Bloxam*, D.D., a magistrate of Warwickshire, under 5 Geo. 4, c. 83, s. 14, (the Vagrant Act,) appealed to the Warwickshire sessions, held in December, 1831, when the conviction was quashed, subject to a case for the opinion of this Court. Dr. *Bloxam* obtained a certiorari for the removal of the order and proceedings of the sessions into this Court; and in April, 1833, the case was sent back to the sessions to be re-stated. At the sessions holden in July, 1833, the appeal was re-heard, and the justices on that occasion confirmed the conviction, subject to a case. In the following Michaelmas term, Dr. *Bloxam* obtained a rule to shew cause why his recognizances (entered into upon obtaining the certiorari to remove the first order and case) should not be discharged,—which rule was, in the same term, enlarged until the judgment of the Court should be given upon the second order of sessions. In Hilary term, 1834, a period of six months having elapsed since the time of holding the sessions at which the conviction was confirmed, and no new certiorari having been obtained to remove the orders and proceedings of those sessions, Dr. *Bloxam* obtained a rule to shew cause why the

rule of Michaelmas term, enlarging the previous rule of that term, above mentioned, should not be discharged, and why the certiorari should not be quashed, and a procedendo awarded for carrying back the record of the conviction. Cause being shewn against this rule in Easter term, 1834, all the rules were discharged, and the matter left as if no rule on either side had been obtained; the Court deciding that when the sessions make an order subject to a case, it must be removed into this Court within six months afterwards, and that the certiorari obtained by Dr. *Bloxam*, to remove the first order of sessions, did not operate to remove the second order, by which the former order had been reversed. At the Midsummer sessions, 1834, an application was made to the justices then assembled, to issue the necessary process for the apprehension and punishment of *Smith*, according to the sentence and tenor of the conviction; and the Court, being divided in opinion as to their power of issuing such process, ultimately declined to do so unless under the direction of this Court.

M. D. Hill, in last Trinity term, obtained a rule to shew cause why a mandamus should not issue to the justices, directing them to issue the necessary process against *Smith*, according to the conviction.

Amos, in this term, shewed cause. The 5 Geo. 4, c. 83, after giving persons convicted under the act a right to appeal to the next general or quarter sessions, enacts, (sect. 14,) "that the Court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as to the said Court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction." Under this section, the only sessions that have power to issue process for the apprehension and punishment of the party convicted, are the

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sessions *at which the conviction is upon appeal confirmed*. Therefore the process should, in this case, have been issued at the July sessions, 1833. The inconvenience which may be supposed to be the consequence of such a construction of the act, with regard to the granting of cases for the opinion of this Court, may be obviated by admitting the party convicted to bail, which this Court may do upon the filing of the return to the certiorari; *Rex v. Reader (a)*. Even if the Court should be of opinion that it was not *imperative* on the same sessions to issue the process, still the application to that Court ought to have been made much earlier than at the Midsummer sessions in 1834.

Waddington, contra. The ground upon which the sessions refused to issue the process was, that they doubted whether under the act they had *power* to do so. In the absence of authority, it is almost impossible for the Court to adopt the construction which has been contended for. The words "such" and "said" cannot reasonably be supposed to mean the *same individual justices* at the same sessions, but must have been intended as a general description of *the Court*. In *Rex v. Justices of Wilts (b)* it was held, that though an act giving an appeal to the sessions, held within four months after the cause of complaint shall have arisen, directs the *said* sessions to hear and determine the appeal; yet that the sessions have an incidental authority to *adjourn* the appeal, if it be necessary for the advancement or convenience of justice. If the sessions had in this case (under the authority of *Rex v. Justices of Wilts*,) power to *adjourn* the appeal, surely they must have power to *respite the execution of the sentence*, or grant a case and leave it to a *subsequent* sessions to issue process, if this Court should ultimately sanction the conviction. It is said that the Court might have bailed the party convicted. But it is, to say the

(a) 1 Stra. 531.

(b) 13 East, 352.

least, very doubtful whether this Court can bail a party who is in execution under a conviction, and even if he were bailable, there would still be great inconvenience in exercising the power.

This case may be viewed in another way. The conviction may be said not to have been *affirmed* at the sessions in July, 1833, but to have been then *affirmed conditionally*, and therefore there was not at that time such an "*affirmance*" as the act contemplates. The conviction is not *absolutely affirmed* until this Court has, upon the case being brought up, decided in favour of the conviction, or until it has appeared by the expiration of six months, or from some other ground, that the case will not be taken up. The proper time for issuing the process is, as it now appears by the late decision of the Court in this case (*a*), at the first sessions after the expiration of six months from the time of granting the case; but this case must be excepted out of that rule, as until last Easter term this Court doubted whether this case might not have been brought up *after the expiration* of the six months;—and it was not therefore until the Court had *decided* that the party was too late to bring up the case, that an application to the sessions to *issue* the process could be made. Therefore, inasmuch as the application was made at the sessions next after this Court had decided that the case could not be brought up, *it was*, within the strictest construction of the clause in the act, made at the proper sessions.

Cur. adv. vult.

LORD DENMAN, C. J., on a subsequent day in the term, delivered the judgment of the Court.—The single point is, whether the act is expressed so unfortunately, that we cannot effectuate the intentions of the legislature in this case, by directing the justices at sessions to issue the process requisite for the enforcing of an order of a preceding Court. It seems to us, that unless there be something which

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(a) *Rex v. Bloram, ante*, iii. 385.

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expressly negatives such a power, the subsequent sessions *can* carry into effect the order of the preceding sessions. *Rex v. Neville (a)* was expressly decided upon that supposition, and is to that extent an express authority in favour of this application. The words of the statute are these—“The Court at *such* general or quarter sessions (that is, the sessions at which the party convicted is to appeal,) shall *hear and determine* the matter of such appeal, and shall make such order therein as to the said Court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction.” The argument against this application was such as might have been expected to be urged if the words of the act had been “shall hear” only, and not “shall *hear and determine*.” We think, however, that the addition of the latter words makes the whole difference, and that the Court of Quarter Sessions holden in July, 1832, when the merits of the conviction were certainly gone into upon appeal, did not *determine*, though it did *hear*, the matter of such appeal;—the order of the sessions, by which this conviction was confirmed, was *fettered by a condition*, introduced in favour of the appellant, which made it uncertain whether that order might not be reversed;—and that, therefore, the matter was not “*determined*,” because not *finally* and *conclusively* determined, although when the condition was removed the determination did become final and conclusive, no further “*hearing*” being either necessary or possible. We are therefore of opinion that some subsequent sessions had jurisdiction to issue *such* necessary process; and that this mandamus must go, *unless* there appears to have been an unreasonable delay. *There* has, in this case, been considerable delay; but we think that it has been satisfactorily accounted for.

Rule absolute

The KING v. The Inhabitants of WRANGLE.

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AN order, by which *Ann*, the wife of *Jonas Page*, (who had absconded,) and their child, were removed from Skirbeck to Wrangle, both in the parts of Holland, co. Lincoln, was confirmed upon appeal, subject to the opinion of this Court upon the following case:—

The respondents shewed a *prima facie* settlement of *Page* in the appellant parish by birth.

The appellants then proposed to shew a subsequent settlement of *Page* by hiring and service in the parish of Sibsey; and called *Collins*, who stated that he hired *Page* for a year at Leake statute, held 13th May, 1822. In answer to a question from the respondents' counsel, he stated that the agreement for the hiring was *in writing*. This he afterwards explained, by stating that he and *Page* went together to *Plant*, the chief constable's clerk, who in their presence, and by their direction, wrote down the terms of the hiring, but the writing was not signed either by *Collins* or by *Page*. The writing was not produced at the trial, and no reason was given for its non-production. The Court held, that oral evidence of the hiring could not be received.

An agreement for the hiring of a servant, may be proved by parol, although the terms of the agreement are, by the direction of the parties, written down by a third person, such writing, though read over to the parties, not being signed by them.

Waddington in support of the order of sessions. [Lord Denman, C. J. How does the fact of some other person's taking a note of the agreement prevent the parol agreement from being given in evidence?] The two contracting parties went to the clerk of the chief constable, and he by their direction, and in their presence, reduced the agreement into writing. The clerk was thus constituted the *agent* of the contracting parties. It does not appear whether any thing was done after the agreement had been entered into, nor is it stated as a distinct fact that the agreement had been already entered into in another place. The cases on this subject are collected in a note to *Starkie on Evidence* (a), and

(a) 2 Stark. Ev. 755, 2nd edit.

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all the cases where the writing was not considered as the agreement of the parties are, either where the writing contained mere *proposals*, or *had not been sanctioned* by both parties. In *Ramsbottom v. Tunbridge* (a) a written paper, not signed by the auctioneer, but delivered by him to a bidder at a sale by auction, and which contained a description of the property to be sold, was held not to be such a writing as would exclude parol evidence. In *Ramsbottom v. Mortley* (b) a paper signed by the auctioneer was held to require an agreement stamp. When there is an agreement requiring a stamp, parol evidence is excluded. *Doe v. Cartwright* (c) is distinguishable from the present case. There, upon the letting of premises, a memorandum of agreement was drawn up, the terms of which were read over and assented to; and it was then agreed that the tenant should on a future day bring a surety and sign the agreement, neither of which he did. It was held that the terms of the letting might be proved by parol,—on the ground that the memorandum was not an agreement, but a *mere proposal*. *Doe v. Cartwright* is recognized in *Hawkins v. Warre* (d). In *Dalison v. Stark* (e), an order for goods was given verbally, and the vendor put down the terms of it in writing as a memorandum, but it was not signed by the vendee. Lord *Ellenborough* held, that the terms of the order might be given in evidence, without producing the written memorandum. There the memorandum was entirely unsanctioned by one of the parties to the contract. If the memorandum in that case had been made at the desire of the defendant, it would have been exactly similar to this case. Here, the person who wrote the agreement was the agent of the parties for this purpose. The objection is, that the agreement is not signed by the parties, but that objection is founded on the *statute of frauds*. But this is not an agreement within the statute, and does not therefore require signature.

(a) 2 Maule & Selw. 434.

(b) Ibid. 445.

(c) 3 Barnw. & Alders. 326.

(d) 5 Dowl. & Ryl. 512; 
 Barn. & Cressw. 698.

(e) 4 Esp. N. P. C. 163.

[Lord *Denman*, C. J. There is no proof that the agreement was entered into by both parties]. It is to be presumed that the parties told the clerk to take down the agreement in writing. In fact neither of the parties could read or write.

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N. R. Clarke, and *Collett*, *contra*. The writing was merely collateral to the agreement, and was not the agreement itself. It would indeed be strange if parties, who could neither read nor write, should be bound to adopt an agreement merely because a third party chose to take down in writing what he supposed to be the terms of the agreement. As to *Ramsbottom v. Tunbridge*, and *Ramsbottom v. Mortley*, it is to be remarked, that where the agreement was signed by the auctioneer, it was deemed binding on the parties, but not where the writing was unsigned. Here, the supposed agreement is not signed by the parties. *Doe v. Cartwright* is in point. There, it was found that the tenant assented to the terms of the memorandum, yet it was held to be only collateral to the agreement. It is for the other side to produce an authority to shew that a memorandum of an agreement not signed by the parties, is to be evidence of an agreement between them. It frequently happens that when a master hires a servant he makes a memorandum; but surely such a memorandum would not be evidence.

LORD DENMAN, C. J.—The master here stated that he had hired the pauper for a year, and in answer to a question whether the agreement was in writing, he stated that he and the pauper went together to a clerk, who in their presence and by their direction entered the minutes of the hiring in a book, but that the entry was not signed by either of the parties. The question is, whether parol evidence of the terms of the hiring was admissible. I think it was; and on this short ground,—that there is no evidence that the writing related to the agreement. It was not proved to have been the bargain, or to have been recognized by the

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parties. It comes to the mere fact of somebody writing down some supposed agreement, which may or may not be the agreement of the parties.

LITLEDAL, J.—On that short ground I am of opinion that parol evidence ought to have been received. These persons desired the clerk to enter the terms of *their agreement*, but there is no evidence that he did so.

WILLIAMS, J. concurred (a).

Order of Sessions quashed.

(a) Coleridge, J. had not taken his seat.

The King v. The Justices of CUMBERLAND.

Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is *excluded* from the computation, and that on which the act is to be done is *included*,—unless there be some special provision requiring a different mode of computation.

CRESSWELL, on the 25th of last November, obtained a rule calling upon three justices of Cumberland to shew cause why a certiorari should not issue to remove into this Court an order made by them at a special sessions held at Carlisle on the 25th of the preceding October, allowing the accounts of the surveyors of the highways, within Orton Quarter, in the parish of Orton, and all proceedings had thereon. This rule was obtained upon affidavits, one of which stated, that each of the three justices had been on the 20th November then instant served with a true copy of a notice (dated on the preceding day), that application would be made for such writ of certiorari to the Court of King's Bench, on the 25th November then instant.

W. H. Watson now shewed cause, and objected that the notice served on the 20th, of an intention to move on the 25th of the same month, was not a good notice with

in by them for the allowance of account in month, is not a sufficient

13 Geo. 2, c. 18, s. 5, requiring six days' notice to be given to magistrates; *Rex v. Justices of Glamorganshire* (a), *Rex v. Justices of Kent* (b).

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Cresswell, contra. The two cases which have been cited are inapplicable. There is no decision as to the mode in which the six days are to be computed. The day on which the notice was served, and also the day on which the motion is to be made, must be *included* in the computation. It is clear that the day on which the *notice is served* is to be included; *Castle v. Burditt* (c), *Lester v. Garland* (d), *Hardy v. Ryle* (e), *Pellew v. Hundred of Wonford* (f). There are many instances in practice in which it is held that the computation must be made with *both days inclusive*. By 9 Geo. 1, c. 22, s. 8, giving a remedy against the *hundred* in certain cases, it is required that a party injured shall give notice within two days after the commission of the offence by which he is injured, and must be examined upon oath, *within four days* after notice, touching his knowledge of the offenders. These four days, it has been decided, must be taken inclusively both of the day of the notice and of the day of examination. This decision is consistent with that on the prior statute; *Norris v. Hundred of Gawtry* (g). [*Littledale, J.* The common rule is, that one day is to be taken inclusive, and one day exclusive. That is the case with respect to an *eight day* rule.] By the rule of H. 2 Will. 4, Reg. VIII. (h), the Court

(a) 5 T. R. 279.

(b) 3 Barnw. & Adol. 250.

(c) 3 T. R. 623.

(d) 15 Vesey, 248.

(e) 4 Mann. & Ryl. 295; 9 Barnw. & Cressw. 603.

(f) 4 Mann. & Ryl. 130; 9 Barnw. & Cressw. 134.

(g) Hobart, 139.

(h) By which it was ordered, that "in all cases in which any particular number of days, not ex-

pressed to be *clear* days, is prescribed by the rules or practice of the Courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also."

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have ordered that the *first* day shall be taken *exclusively*, the *last* day *inclusively*. Upon the *authorities*, therefore, the day of service is included, and by the *rule of Court*, the day of motion is to be included; consequently this notice was sufficient.

LORD DENMAN, C. J.—In *Rex v. Justices of the West Riding of Yorkshire* (a), a question arose, as to whether a notice which had been there given, of an intention to appeal against an order of two justices for the diversion of three footpaths, was a sufficient notice under the 55 Geo. 3, c. 68, s. 3, which requires ten days' notice of appeal to be given. It was contended, that both the day on which the notice was served, and that on which the sessions commenced, ought to be *excluded* from the computation, and that, therefore, a notice of appeal served on the 25th June, the sessions commencing on 5th July, was insufficient. The Court, however, held, that as nothing was expressed in the act as to the mode of computation, and as it did not require ten *clear* days' (b) notice, one day ought to be excluded, the other included. The officers of the Court inform us, that it is the constant practice, in making computations of this sort, to exclude one day, and to include the other, except where another mode of computation is specially required. I think, therefore, that the notice in the case was insufficient, and that the rule must be discharged.

LITTLEDALE, J. and WILLIAMS, J. concurred.

Rule discharged.

(a) *Ante*, vol. i, 426; 4 Barn. & Adol. 685.

(b) And see *Gould v. White*, 4 Mann. & Ryl.

DOE, on the several demises of SMITH and PAYNE,
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FOLLETT, in the last term, obtained a rule calling upon the defendant to shew cause why it should not be referred to the master to review his taxation of the defendant's costs. The affidavits disclosed the following facts :

The cause was tried at the Devon spring assizes, 1834, and the plaintiff obtained a verdict upon the demise of *Smith*;—the title of *Payne* and the demise from him having been disclaimed by the plaintiff's counsel. The defendant was, until the opening of the plaintiff's case, totally ignorant of the title of *Smith*—and came to the trial prepared with evidence of the proceedings in a former action of ejectment, in which he had recovered against *Payne*, the title of whom alone the defendant expected would on this occasion come in question. The evidence would not have been prepared if the count on the demise of *Payne* had been struck out before the trial. The plaintiff's counsel having, however, shewn a title in *Smith*, as mortgagee, before the former ejectment brought, the defendant's counsel called and examined his witnesses, and produced an award, made in favour of the defendant in the former ejectment, and shewed that *Smith* had been examined before the arbitrator as a witness on behalf of *Payne*, and contended that the evidence was admissible against *Smith*. This was denied by the plaintiff's counsel; and the evidence was rejected by the learned judge as inapplicable to the title of *Smith*. *Erle*, in Easter term last, moved for a new trial, on the ground that the evidence had been improperly rejected; but the Court held that it was clearly inadmissible as against *Smith*, and therefore refused the rule (a). The verdict was entered for

Whether (under R. H. 2 W. 4, Reg. I, 74, or R. H. 4 W. 4, Reg. I, 7,) particular costs, incurred in relation to the trial of the cause, are referable to one issue or another, is a question of fact for the decision of the Master alone.

The Court ought not to be called upon to inquire into the correctness of the Master's decision upon such question.

Where, in ejectment upon the several demises of *A.* and *B.*, the defendant, being ignorant of the title of *A.*, goes to trial prepared with evidence in answer to the title of *B.* only, and the plaintiff's counsel disclaims the title of *B.*, (the issue in respect of whose demise is there-

(a) *Ante*, vol. iii. 746; 1 Adol. & Ell. 119.

fore found for the defendant,) and obtains a verdict under the demise from *A.*—the Master is justified in allowing the defendant the costs of the evidence so prepared, although at the trial the witnesses were examined by the defendant's counsel, and their evidence was offered as against the title of *B.*, but rejected as inapplicable, and although the defendant afterwards moved for a new trial on the ground of the rejection of the evidence, and the Court refused the rule on the same ground.

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the defendant upon the count on the demise of *Payne*.
 SMITH The plaintiff's costs were taxed at 131*l*. Upon the taxa-
 tion of the defendant's costs, it was disputed before the
 128. Master whether the defendant was entitled, under R. H.
 4 *W.* 4, Reg. I, 7 (*a*), to the costs of the evidence above
 mentioned. On the part of the defendant it was contended
 that the costs incurred by him were wholly referable to the
 issue on the demise of *Payne*; and on the part of the
 plaintiff it was urged, that under the circumstances, the
 costs must be considered as referable to *both* the issues,
 notwithstanding that the evidence might have been originally
 prepared with reference solely to the title under the demise
 from *Payne*. The Master, after receiving much evidence
 and fully considering the question, decided that the defend-
 ant was entitled to the costs in question; and they were ac-
 cordingly taxed at 197*l*. 10*s*. The plaintiff's costs of 131*l*.
 were set off against the defendant's costs, and the latter had
 an allocatur for 66*l*. 10*s*.

Erle and *Crowder* now shewed cause. The defendant is
 entitled to these costs under R. H. 4 *Will.* 4, Reg. I, 7, as
 costs occasioned by the demise on which the plaintiff
 failed, and on which therefore the verdict and judgment
 passed against the plaintiff. The objection is, that the
 costs were not occasioned solely by reason of that demise.
 The Master has decided against this objection. [*Fol-*
lett, S. G., stated that one objection was, that the rule does
 not apply to actions of ejectment.] The rule of H. 2 *W.* 4,
 Reg. I, 74 (*b*), is equally good for this purpose. The material
 question is, whether the costs are referable to the demise
 by *Payne* only, or to both demises. It is distinctly sworn
 that the whole expense was incurred in consequence of the
 demise from *Payne*, and that the evidence in question
 would not have been prepared if that demise had been
 omitted, or if notice had been given of the plaintiff's inter-

(*a*) *Ante*, iii. 5.

(*b*) See this rule, *post*, 384.

tion to abandon it. It will be said that the evidence was *used* in answer to the demise by *Smith*. It is true that the title of *Smith* coming upon the defendant's counsel by surprise, they took the opinion of the judge, and afterwards of this Court, as to the admissibility of the evidence in answer to *that* title; but both by the judge and by this Court the evidence was held to be wholly inadmissible as against *Smith*. Though the witnesses were examined and the award produced, the evidence did not *go to the jury* in the regular way; and it cannot therefore be said to have been *used* in answer to the title under the demise by *Smith*.

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Follett, S. G., contra. The rule of H. 4 W. 4, Reg. I, 7, is clearly not applicable, because the action was commenced and tried before that rule came into operation; and therefore the rule on which the defendant must rely is that of H. 2 W. 4, Reg. I, 74. If the decision of the Master (who appears to have considered only the rule of H. 4 W. 4,) be supported, this singular consequence will follow,—that the plaintiff, having recovered in the action, will yet be liable to pay costs to the defendant. The witnesses were *examined* in respect of the demise by *Smith*. It is not to be said that because the judge, and afterwards the Court, held the evidence inadmissible as against *Smith*, therefore the defendant is to have the costs of those witnesses, as being witnesses in respect of a demise not supported by the plaintiff. An *experiment* was made by the defendant, and it failed. The evidence was *capable* of being used upon *both* issues, and *was* so used. The evidence must be applicable *exclusively* to a count upon which the defendant succeeds, in order to entitle him to the costs; and therefore if it be in any way applicable to that count on which the plaintiff succeeds, the defendant cannot have the costs. It is not denied that the evidence was *prepared* as against *Payne*; but the witnesses were *examined* and *relied upon* as against *Smith's* title. The defendant failed in his attempt to make out

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this defence, and now he calls upon the plaintiff to pay the costs of that very evidence upon which that defence was rested.

3.

LORD DENMAN, C.J.—The real question is, whether these are costs of the issue found for the defendant. The rule directs, “that no costs shall be allowed, on taxation, to a plaintiff, upon any count or issues on which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff’s costs.” The principle is undisputed. The only question therefore is, whether the Master has done wrong in adjudging that the defendant is entitled to these costs. I see no doubt in the case. Balancing the statements on both sides, I think that the costs *were* applicable to the demise in respect of which the defendant succeeded. It was for the *Master* to decide whether the costs were the costs in respect of one demise alone, or in respect of both; and we think that the Master has decided rightly. The plaintiff has brought the mischief upon himself by putting *two* titles on the record, one of which he was unable—and did not intend—to support. It is true that the defendant did tender the evidence upon the other issue; but I cannot admit that the defendant’s counsel has brought a liability to costs upon his client by offering this evidence as he has done.

LITLEDALE, J.—This was a matter entirely for the discretion of the Master. He has taken much pains in order to come to a right conclusion; and I think he has succeeded. I see no principle whatever upon which we can call upon him to review his taxation. I do not think the costs need be *confined so entirely*, as has been contended, to the issue found for the defendant.

WILLIAMS, J.—I entirely concur. The Solicitor-Gen does not say that the Master has mistaken the *princi*

and the discussion is only upon a matter of fact, which is undoubtedly for the decision of the Master. We ought not to be called upon to weigh matters of fact. That is for the discretion of the Master, where the Master is not mistaken in principle.

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Rule discharged.

WILLIAM SPENCE and another, Executors of JOHN
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ASSUMPSIT to recover a balance due in respect of goods sold by the testator. The declaration contained counts on promises to the testator, and also a count on an account stated with the plaintiffs as executors. Plea: non assumpsit. At the trial, the defendant proved that she was, at the time of the sale of the goods, and still is, a feme covert, and the plaintiffs were nonsuited. The defendant had repeatedly promised the plaintiffs to pay them the debt which was due to the testator; and the plaintiffs were not, at the time of bringing the action, aware of the coverture; nor did it appear that the testator was aware of that fact. The plaintiffs had no assets belonging to the testator. The Master taxed the defendant's costs at 24*l.*, which, as far as regarded the pleadings, applied only to the count on the account stated with the executors.

Upon a declaration containing an account stated with the plaintiffs as executors, though it also contains counts on promises to the testator, the defendant is, in case of a nonsuit, entitled to costs *as of course*.

The discretion as to costs in actions by executors, given to the Court or a judge of any of the superior Courts, by 3 & 4 Will. 4, c. 42, s. 31, extends only to cases in which executors were, before that enactment, exempted from the payment of costs.

Alexander, in the last term, obtained a rule calling upon the defendant to shew cause why the Master should not review his taxation.

Ball now shewed cause. This application is founded upon the 31st section of the act for the amendment of the law, (3 & 4 Will. 4, c. 42,) the words of which are: "In every action brought by any executor or administrator in right of the testator or intestate, such executor or adminis-

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trator shall), (*unless the Court in which such action is brought, or a judge of any of the superior Courts, shall otherwise order,*) be liable to pay costs to the defendants in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." This case is not, however, one in which the Court have a discretionary power as to the costs, because (inasmuch as a contract with the plaintiffs themselves is declared on) it is a case in which, as the law stood before the passing of the act, the executors were liable to costs; *Dowbiggin v. Harrison* (a), *Jobson v. Foster* (b). *Lysons v. Barrow* (c), which has been decided since the promulgation of the new rules, will probably be relied on contra. But that case was, both in the argument and in the judgment of the Court delivered by *Park J.*, expressly distinguished from *Dowbiggin v. Harrison*, and *Jobson v. Foster*, on the ground that the contract alleged in the declaration in that case was such as the plaintiffs could not have sued upon, except in their representative character. For the same reason the case is distinguishable from the one before the Court, which is precisely similar to the other cases which have been referred to.

Alexander, contra. Undoubtedly where it appears that the plaintiff might have recovered in his individual character, he was liable to costs before the statute; but it does not follow that in such case the Court have no discretionary power as to the costs. *Lysons v. Barrow* shew that the Court have such discretionary power;—and this is a case in which the Court will, in the exercise of their discretion,

(a) 4 Mann. & Ryl. 622; 9 *Jones v. Jones*, 1 Bingh. 249; 8 B. Barn. & Cressw. 666. Moore, 146.

(b) 1 Barn. & Adol. 6. And see (c) 10 Bingh. 563; 4 Moore & *Grimstead v. Shirley*, 2 Taunt. 116; Scott, 463.

“otherwise order,” as the act expresses it. The language of *Park, J.* in *Lysons v. Barrow*, gives a criterion, according to which this case is entitled to the favourable notice of the Court. His lordship says, (a) “One main point to consider is, was this a *frivolous action*? So far from it, that it appears from the affidavit that it was the *bounden duty* of the plaintiffs to the estate of the testator to bring an action. The plaintiffs were defeated on a ground which they could not be supposed to apprehend. The promise could only, from the nature of the case, be a promise after the death of the testator; but still if a verdict had been obtained by the plaintiffs, the fruit of the verdict would have been assets. The action could only be brought by the plaintiffs in their representative character, for in their individual state they had no more right to sustain an action than the greatest stranger.” So, in *this case*, the action was *not frivolous*;—it *was the bounden duty* of the plaintiffs to bring an action, for it is not denied that the debt claimed was justly due, and it is sworn that the plaintiffs did not know that the defendant was a married woman, and that it was believed that the testator was not aware of the fact; and *this also* was an action which could only be brought by the plaintiffs in their representative character. Under these circumstances it is hoped that the Court will think it right to relieve the plaintiffs from the payment of costs.

Cur. adv. vult.

LORD DENMAN, C. J., on a subsequent day in the term, said,—We have consulted with the other judges upon this question, and we are of opinion that we cannot interpose, and that the rule which has been obtained must be discharged.

Rule discharged.

(a) 10 Bingham 567. And see 4 Moore & Scott, 469.

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The KING v. The Inhabitants of ST. MARTIN'S,
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A. is apprenticed to B. & C., partners. The partnership being dissolved, B. removes, and A. serves C. and C.'s new partner D. After the death of C., A. continues to serve D.

It not being found by the sessions that the service under D. was with the consent of B., this Court will not refer the service to the apprenticeship.

No settlement is therefore gained by A. in the parish in which he served and resided with D.

AN order for the removal of *John Snell* and *Ann* his wife, from Puddington, Devon, to St. Martin's, Exeter, was confirmed, subject to the opinion of this Court upon the following case :

8th February, 1807, *Snell* was bound apprentice for seven years, to *John* and *William Mildrum*, linen-drappers, in St. Martin's. He resided in their house in that parish in service under his indentures fifteen months, when the partnership being dissolved, *W. Mildrum* left Exeter and set up business at Totness. *Snell* continued to serve and reside with *J. Mildrum*, who soon after entered into a new partnership with *Proctor*. Some time after this, *J. Mildrum* and *Proctor* having opened a linen-draper's shop at Tiverton also, *J. Mildrum* went to reside there with his family, but continued to carry on business with *Proctor* in St. Martin's. *Snell's* usual place of residence and employment was still in St. Martin's, but he was frequently seen over to assist in the shop at Tiverton, where he sometimes remained one, two, or several nights in succession; and he slept more than forty nights in Tiverton before the death of *J. Mildrum*. When the shop at Tiverton had been open nine months, *J. Mildrum*, being taken ill, removed to Exeter and died. At the time of his death *Snell* was at Tiverton, having gone there a few days before. He remained there till the Sunday following, and then returned to Exeter, where, having attended his master's funeral, he served in the shop as usual, and slept on the premises. Shortly after the funeral, *Snell* entered into an engagement with *Proctor*, and he never afterwards resided with or had any communication with *W. Mildrum*.

The question for the opinion of the Court is, whether *Snell* was last settled in Tiverton or St. Martin's.

John Greenwood, in support of the order of sessions. *Snell's* last place of settlement was in St. Martin's. It could not be in Tiverton, except upon the supposition that the death of *John Mildrum* operated ipso facto as a dissolution of the apprenticeship, or that *Snell* ceased to be inhabiting, from that period, in the character of an apprentice. Perhaps it will be said *contrà*, that there can be no valid binding to *two* masters. If so, the question submitted is wholly irrelevant. [*Crowder*, *contrà*, stated that he did not mean to deny the validity of the indentures, and that the question was—whether, assuming the indentures to be good, the latest residence under them was in Tiverton or in St. Martin's.]

I. Now, first, even supposing that *Snell* had been apprenticed to *J. Mildrum* alone, the death of the master would not operate as a dissolution of the apprenticeship. It is said by Sir *Edward Gambier*, in his work on *Parochial Settlements*,—and supported by a series of authorities, down to very recent decisions,—that “a valid deed of apprenticeship may be annulled by the death of the master, *if the apprentice chose to take advantage of that circumstance, otherwise it may continue*”(a). *Rex v. Peck*, per *Holt*, C. J. (b), *Walker v. Hull* (c), *Wadsworth v. Gye* (d), are authorities to shew that the indentures subsist, at least for some purposes, after the death of the master, and that although the apprentice is not compellable to serve the master's representatives, they are liable to an action of covenant. The language of the Court in *Baxter v. Burfield* (e), as it is reported in *Strange*, may be quoted on the other side; but from another report of the same case (f), it appears that the Court there relied on the omission of the word “executors” in the covenants; and at all events, the whole effect of that case was said, in the case of *Rex v.*

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(a) P. 56, 1st edit.

(b) 1 Salk. 66.

(c) 1 Levinz, 177.

(d) 1 Siderf. 216.

(e) 2 Stra. 1266.

(f) 1 Bott's P. L. by Const, 523, pl. 745;—5th ed. 581, pl. 819.

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Stockland, to be, that the apprentice was not compellable to serve. In *Rex v. East Bridgeford* (a) it was held, that "an apprentice gained a settlement by serving forty days in a different parish, under an assignment made by the assignee of the widow (b) of the original master." And *Rex v. Stockland* (c) was decided upon the authority of *Rex v. East Bridgeford*, which had been opposed in argument to *Baxter v. Birfield*. Shortly after these decisions, the 32 Geo. 3, c. 57, was passed, which recited the hardship of compelling the executors of deceased masters to maintain the apprentice, although the apprentice was not compellable to serve them, and therefore in the case of parish apprentices, with whom no more than a premium of 5*l.* had been paid, the liability of the executors &c. was limited to three months. The case of all other apprentices, including parish apprentices with whom a larger premium had been given, remained as before the act. It is true that while the preamble thus recognizes the subsistence of the covenants after the master's death, it adds, "or doubts have arisen with respect thereto," but since that act, the decisions to which it refers have been repeatedly acted upon without one conflicting case, and whether the service after the master's death was to an executor, administrator, executor de son tort, or the widow; *Rex v. St. Paul's*, *Bedford* (d); *Rex v. Sheephead* (e), (per Lord Ellenborough); *Rex v. Barnsley* (f); and the same principle is admitted in the case of contracts for hiring and service, *Rex v. Ladock* (g), *Rex v. Hardcum Newton* (h). Then if the indentures still subsisted, *Snell* was in law an apprentice; and as his ordinary employment, and place and manner of living, were unaltered, all events until his new engagement with *Proctor*, he

(a) Burr. S. C. 133.

(b) Such widow being also the personal representative of her husband.

(c) 15 East, 59.

(f) 1 Maule & Selw. 377.

(g) 2 Stra. 1164; Burr. S. C. 179.

(h) 12 East, 51.

habited in St. Martin's as an apprentice up to that time, and therefore gained a settlement there.

II. *W. Mildrum* survived his brother, not having done any thing to disclaim the continuance of the apprentice's service to him. The dissolution of partnership, to which *Snell* was not privy, could not alter the relation between the masters and the apprentice. Neither the apprenticeship, nor the character in which the apprentice inhabits, is dissolved or altered by the mere *absence* of the master. If *both* masters had been absent from the shop, and the apprentice had continued there under a foreman, the service would still have been a service under the apprenticeship. In cases in which, in addition to the absence of the master, there has been strong evidence of an intention on the part of the master to throw off the apprenticeship, it has been held that the apprenticeship still continued for the purposes of settlement; *Rex v. Chipping Warden* (a), *Rex v. Christowe* (b), *Rex v. Bow*, otherwise *Nymett Tracy* (c), *Rex v. Foulness* (d). Then if, in point of law, *Snell* still continued an apprentice to *W. Mildrum*, after the latter went to Totness, did he not also continue, in point of fact, to serve him in the character of an apprentice, until he engaged with *Proctor*? Up to that time he served in the same shop and slept upon the same premises, and was occupied in the same employment in which he was first placed by *W. Mildrum*, and in which he had continued for fifteen months, under his immediate superintendence and control. If within a week, or a month, or a year, *Snell* had transferred his services to another master, or left the shop, would it not have been an act of disobedience to *W. Mildrum* as well as to *John*? It is unnecessary therefore to maintain that the circumstances of this case shew an express consent of *W. Mildrum*, to *Snell's* service in *J. Mildrum's* and *Proctor's* shop, because his service there was an actual service to *W. Mildrum*. And if he was serving him in fact, and was his apprentice in law, by reason

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(a) 8 T. R. 108.

(b) 11 East, 95.

(c) 4 Maule & Selw. 383.

(d) 6 Maule & Selw. 351.

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of the continuing subsistence of the indenture, his inhabiting in Exeter was referable to his apprenticeship, until, by engaging with *Proctor*, he put an end, not to the indenture, but to his service with *W. Mildrum*. In either case, therefore, by continued service in *J. Mildrum's* establishment after his death, or by service to *W. Mildrum* till his new engagement, *Snell* was settled in St. Martin's.

Crowder, contra. There is nothing to shew that the residence in St. Martin's, subsequently to the death of *J. Mildrum*, was under the apprenticeship, or that *Snell* was under the control of any master with the assent of the original master. In order to make a service under any other than the original master, such a service under the indenture, that, connected with residence, it shall confer a settlement, there must be the *express assent* of the original master. *J. Mildrum* in his lifetime had the control over *Snell*, and though *Proctor* became his partner, it by no means follows that *J. Mildrum* gave *Proctor* any control over his apprentice. Nor is there any thing to shew that *W. Mildrum* expressly assented to *Snell's* serving *Proctor*, and it is clear that he did not serve *W. Mildrum* himself. In *Rex v. Whitchurch (a)*, it was laid down that there must be an *express assent* by the master. Here, it is not shewn that *W. Mildrum* ever heard what had become of *Snell*, or that he knew *Proctor* at all; and with regard to what is said as to the executors of *J. Mildrum*, it does not even appear that there were any executors, much less that they had given their express assent to *Snell's* serving *Proctor*. He was stopped by the Court.

LORD DENMAN, C. J.—I think that we cannot say that *Snell* is settled in the parish of St. Martin's, Exeter. It is quite clear, that in order to make a residence by an apprenticeship with a second master, a residence under the apprenticeship, it must be shewn that the person to whom the appren-

(a) 1 Barn. & Cressw. 574.

tice was bound, consented to the particular service of the apprentice with the second master. No consent is stated; and from the case submitted to us, we cannot infer that fact. The sessions were at liberty to draw such an inference from the facts stated, but we cannot do so.

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LITLEDALE, J.—I also am of opinion that no settlement was gained in St. Martin's. It is not necessary to consider the effect of the death of the master. Undoubtedly the cases have established that the executor of the master stands in his place; and it is competent to the executor to create a new contract by actual assignment or by word of mouth. But I do not think that the question as to the death of the master arises at all. The binding being to both, the apprentice continued, after the death of *J. Mildrum*, bound to *W. Mildrum*. The executor therefore of *J. Mildrum* had no right to interfere, and had no power to transfer the apprentice. If the apprentice had continued with *Proctor*, with the assent of *W. Mildrum*, that would have been a different thing. But *W. Mildrum* has in no way interfered, and appears not to have known any thing about the apprentice from the period of the dissolution of the partnership with his brother. It is the same thing as if the binding had originally been to *W. Mildrum*(a), and nothing had been said by him as to the service of the apprentice under the second master.

WILLIAMS, J.—I am of the same opinion. The case does not warrant our inferring that the residence in St. Martin's, subsequent to the death of the master, was a residence under the indenture; and unless that fact appear, the residence can confer no settlement. The cases which have been referred to do not apply.

Order of Sessions quashed.

(a) *Vide* Co. Litt. 185 a.

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The KING v. The Justices of SOMERSETSHIRE.

The Court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied.

And the prosecutor having, previously to the motion for a rule for a mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs.

ERLE, in the last term, obtained a rule, calling upon *Thomas Henry Mirehouse*, clerk, and *Charles Abraham Elton*, Esq., two justices of the peace for the county of Somerset, to shew cause why a writ of mandamus should not issue, commanding them to make and issue their warrant for levying a distress upon the goods of *James Maclean*, the sum 1*l.* 6*s.* 9½*d.*, assessed upon him in respect of lands in the parish of Clevedon, in the said county, for and towards the amending the highways in that parish.

The affidavits upon which the rule was obtained, and those sworn in opposition to it, disclosed the following facts :

By an act of 39 *Geo.* 3, (A.D. 1799,) for inclosing certain commons and moor lands in the parish of Clevedon, commissioners were appointed to carry the act into effect, and were authorized and required to set out such public carriage roads over the moors &c. intended to be inclosed, as they should think necessary, which roads, when made, were to be repaired in the same manner as other public roads in the parish of Clevedon were by law to be repaired ; and also to set out such public bridle-roads and foot-ways, and private roads and ways, and other conveniences, in, over, and upon the moors &c., as they should think requisite ; and the same were to be repaired by such persons and in such manner as the commissioners should direct and appoint —

In 1801, the commissioners, by their award, set out certain drove-ways and private occupation-roads, (the expense of repairing which they directed should be defrayed by means of an assessment upon the occupiers of the newly-inclosed lands,) but set out no public roads,—none such being in the opinion necessary. It did not appear that there had been any public road over the moors and commons at any time before the inclosure. Until 24th March, 1834, the occupiers of the newly-inclosed lands, though assessed to all other parochial rates in the parish of Clevedon, had never

been assessed in the general-highway-rates of the parish, nor have they ever been called upon to perform any statute-duty upon the public roads of the parish, or to pay any composition in lieu thereof. They have repaired their own roads out of the proceeds of assessments made amongst themselves, and have had a distinct surveyor of their own. The statute-duty having been performed by the occupiers of the remainder of the parish, and the roads being so far out of repair, that even if the occupiers of the newly-inclosed lands had performed statute-duty, a highway-rate would have been requisite, the parish surveyors gave notice that they should, on the 24th March, 1834, apply to the magistrates, at a special sessions of the highways, to be held on that day, for the division of Bedminster, in the county of Somerset, for a highway-rate to be made on all the occupiers of lands &c. within the parish. On the 24th March an application was accordingly made to the justices by one of the overseers, who stated that all the duty required by 13 Geo. 3, c. 78, had been duly performed, and that the moneys authorized by that statute to be collected and received, had been duly applied and expended, and that the highways were so far out of repair, that a rate was absolutely necessary. An order was, upon this application and statement, (which were recited in the order,) made by two justices. An assessment upon *all* the occupiers within the parish, which had been previously prepared, (and which bore no date, except that the title stated that it was a rate for the repair of the roads of Clevedon, "for the year 1834,") was on the same day, and at the same special sessions, presented to two other magistrates for their allowance, and was signed and allowed by them. It did not appear upon the face of the allowance, that the two magistrates, who so signed and allowed, acted in the capacity of justices of the peace. In this assessment, *Maclean* was rated at 1*l.* 6*s.* 9*d.*, for part of the newly-inclosed lands. No notice of the special sessions held on the said 24th March was given to any of the county magistrates, by the constable of either of the

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hundreds within the division of Bedminster. The clerk of the justices of the division had, at the commencement of the year, (according to the usual custom within the district,) issued to each justice of the division, a printed statement of the times and places when and where the justices would, during the whole year, meet in petty or special sessions, and in this statement the 24th March was mentioned as a day on which to hold a special sessions. No other notice had been received by any magistrate. *Maclean* having refused to pay the 1*l.* 6*s.* 9*d.*, the surveyor obtained a summons requiring him to appear before the justices to shew cause why he refused to pay such sum. *Maclean* appeared at a meeting of justices, held 5th May, at which meeting Mr. *Mirehouse* and Mr. *Elton* were the only magistrates present. One of the surveyors having produced the assessment and proved a refusal by *Maclean* to pay the amount, *Maclean* objected that the occupiers of the newly-inclosed land (supposing them to be liable at all to contribute to the *highway-rates* of the parish, which was questioned,) had not been called upon to perform *statute-duty*, and he also objected that the assessment was illegal for want of a *date*. *Maclean* informed the magistrates, that in the event of their signing a warrant to distrain upon his goods for the rate, an action of trespass would be immediately commenced against them by him. It being admitted that *Maclean* had never been called upon to perform *statute-duty*, the magistrates expressed a doubt as to the validity of the rate, and said that they should take time to consider of the matter. On 24th May, *Maclean* was served with a second summons, and he in consequence appeared on 26th May, at a meeting of justices, at which Mr. *Mirehouse* and Mr. *Elton* were again the only justices present. One of the parish surveyors preferred an information and complaint on oath, against *Maclean* for non-payment of the assessment, and applied for a *distress-warrant*. *Maclean* admitted that he had refused to pay the rate, and objected to the assessment as illegal, on the grounds mentioned on the previous occasion; and upon

being asked by the surveyor, whether, if the rate were abandoned, he would perform statute-duty, he denied his liability to contribute in any way to the repair of the public highways of the parish. He again threatened an action in case a distress-warrant should be granted. On the other hand, *Macey*, an attorney, who appeared for the parish, told the magistrates, that in the event of their refusing to grant a warrant, an application for a mandamus to compel them to do so would be made to this Court. No adjudication was at any time come to by the magistrates upon the general question, whether the newly-inclosed lands were ratable to the highways, though they expressed it as their belief that they were so ratable; but they suggested to the parties that the proper tribunal for deciding that question was the sessions upon appeal. At the meeting on 26th May, *Macey*, in answer to a question from the two justices, stated his belief that the parish would indemnify the magistrates against any action to be brought against them by *Maclea*n; and on a subsequent occasion he said, that he had the authority of the parish for offering to call a vestry meeting, for the purpose of giving such indemnity to the magistrates, if they would immediately issue their warrant, but no formal indemnity was ever offered, nor did it appear that any vestry was at any time assembled, for the purpose of considering the matter of indemnity. Mr. *Mirehouse* and Mr. *Elton* therefore fearing that an action would be brought against them by *Maclea*n, and fearing that by reason of the statute-duty not having been called out and performed, the result of that action might be unfavourable to them, refused to grant a distress-warrant.

Sir *John Campbell* and *F. N. Rogers* now shewed cause. This Court will not compel magistrates to do an act which will expose them to an action, the result of which may be doubtful; *Rex v. Justices of Buckinghamshire (a)*, *Rex v.*

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(a) 2 Dowl. & Ryl. 689; 1 Barn. & Cressw. 485.

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Newcombe (a). It is quite clear, that if the warrant which it is now sought to compel these magistrates to issue, were issued and acted upon, an action *would* be brought against them; and it seems equally clear that there exists a *reasonable doubt* as to the result. There are several objections to the assessment, of which these magistrates were, at the time of the application for the distress warrant, informed, and they would therefore clearly be liable to damages, if *any* of those objections should prove fatal to the assessment. In *Stanley v. Fielden* (b), *Bayley, J.* says, "A magistrate is not amenable for granting a warrant, if at the time of granting it he has documents before him (which are the acts of other magistrates), from which it appears he was justified in granting the warrant. But if the want of jurisdiction is manifest from all the proceedings before him at the time, then he grants the warrant at his peril." The observations of Lord *Ellenborough*, in *Lowther v. Lord Radnor* (c), is to the same effect. Now here, there were defects in the proceedings, which made the jurisdiction of the justices at the least doubtful; and of these defects the magistrates were well aware at the time they were called upon to grant the warrant. First, it did not appear upon the face of the allowance, that the two persons who signed it acted in the capacity of justices of the peace. *Rex v. Fylingdales* (d) shews that the authority of magistrates ought to appear upon the acts done by them. Secondly, the magistrates assembled on the 24th March had no jurisdiction to make the order for the assessment, because the special sessions had not been duly convened. Formerly it was held, that each magistrate acting within the district should have a notice of the holding of special sessions, proceeding directly from the constable of the hundred; and though the rule has since been somewhat relaxed, it is still necessary that the notice should emanate from the constable. Here, the notice

(a) 4 T. R. 368.

(b) 5 Barn. & Alder. 425.

(c) 8 East, 119.

(d) 1 Mann. & Ryl. 176; 7 Barn. & Cressw. 438.

given by the magistrates' clerk, and this has been held to be insufficient. Thirdly, the order of assessment is bad, inasmuch as the supposed facts, of the statute-duty having all been called out and performed, (which is recited in it,) is untrue; and the incorrectness of this recital was known to these two magistrates at the time of the application for the warrant. Until the statute-duty is all performed, or a composition in lieu thereof is paid, received, and expended, or unless it is shewn that the roads are so far out of repair that the statute-duty and composition money would be insufficient for the repair of the roads, justices have no power to order an assessment to be made for the purpose. Again, another objection taken is, that the assessment is without a *date*. But the principal question in this case is, whether this district is liable to contribute in *any way* to the repair of the highways of the parish. [Lord *Denman*, C. J. I certainly do not see what ground exists for an exemption of this district.] That is a question which cannot be decided here now, and it is a question which the justices could not be called upon to decide. The proper tribunal for the discussion and decision of that question is the Court of Quarter Sessions. No indemnity was offered in such a form that the magistrates could be expected to expose themselves to an action upon the faith of it.

Erle, contra. With regard, first, to the indemnity. The offer which was made by *Macey* was sufficient. He offered to call a vestry (a) for the purpose of giving to the magistrates a regular indemnity; and the prosecutor now repeats the offer, and is willing that this rule shall be enlarged, and that its fate shall depend upon the production of a sufficient indemnity. (This offer was not acceded to.) The substantial question is, whether these moor lands are liable to the highway-rate; and there seems to be no ground

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(a) *Quere*, whether the vestry had power to bind the parish by an agreement to indemnify. *Vide Rex v. Guyer, ante, 158.*

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whatever for an exemption of this district from the duty of contributing to the repairs of the highways of the parish. If the occupiers of these lands are liable to contribute, and the rate was properly made by persons having jurisdiction, then this Court will compel the magistrates to issue their warrant for the purpose of enforcing the payment of the rate. The objection that the statute-duty was not called out and performed, is answered by the statement, upon affidavit, that even though the statute-duty had been all performed, a rate would still have been necessary. An offer was made to *Maclean* to abandon the rate, if he would perform the statute-duty; and he then refused to accept the offer on the ground of a total exemption. The objection that the sessions at which the order of assessment was made were not duly convened, comes with a bad grace from the magistrates, who must themselves have adopted the mode of giving notice described in the affidavits, as preferable to that which, it is contended, is the *proper* mode of giving notice. It is evident that all the magistrates must have had notice of these special sessions, and that is all that is really required. Another objection is, that the order for the allowance of the assessments does not appear to be made by the two magistrates in the capacity of justices of the peace. It appears however, on the face of it, to have been made at a *special sessions*; and the Court will infer from that fact that the two magistrates who signed it acted *as magistrates*. The cases of *Lowther v. Lord Radnor* and *Stanley v. Fielden* are not in point. In those cases the objection was that the magistrates had issued a warrant of distress, they themselves having at the time no jurisdiction. Here, the magistrates are called upon to act under an order of other magistrates, made a long time before, and the defects suggested are the want of jurisdiction in the *other* magistrates. The proceedings produced before these two magistrates would be a sufficient answer to an action of trespass brought against them for issuing their warrant. All the necessary facts were sworn to. The validity of the

preliminary documents could not be questioned. *Fawcett v. Foulis* (a). With regard to the general question as to the liability of the newly-inclosed lands to be rated, it is submitted that the appeal to the Court of Quarter Sessions could not be the proper mode of trying the question. Such a proceeding would have been nearly nugatory; for if, upon appeal, the sessions had declared the rate bad, another would have been made, and the party would have stood in precisely the same situation as before, because, upon a point of this sort, the decision of the sessions is not final.

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Lord DENMAN, C. J.—This is an application for a mandamus to magistrates to enforce a rate by a warrant of distress. If that rate is for any reason invalid, the parties interested have a remedy by appeal. That is the remedy pointed out by the act of parliament, and we must, in the first instance, suppose it to be an ample remedy. If the rate includes the newly inclosed lands, (as is the case with this particular rate,) the owners of those lands may appeal. If, on the other hand, a rate should be made which did not embrace the newly inclosed lands, then the rest of the parish, being interested in throwing a portion of the burthen upon the owners of those lands, might in their turn appeal; so that the act of parliament has pointed out a full and satisfactory mode of correcting any mistake of this sort. Then the justices in special sessions having made this rate, the question is, whether we ought to order these magistrates to enforce it by a warrant of distress? It would strike me that on every such occasion the proper tribunal should be appealed to in the first instance by one side or the other; that is the proper mode of trying such a question. I think that there is very considerable reason for doubting whether this district is or is not liable to be rated. That doubt ought to be resolved by the sessions on appeal.

(a) 1 Mann. & Ryl. 102; 7 Barnw. & Cressw. 394.

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We do not know on which ground the alleged exemption of this district rests, and therefore we do not know that we should not expose the magistrates to an action in which they would be liable to damages, if we were to compel them to issue a warrant of distress in this case. It is unfortunate, seeing that there is a *bonâ fide* disposition to try a question of public importance, as this certainly is, that those who have brought the question here have not taken care to put themselves clearly right with the magistrates. It appears to me that they ought in the first instance to have obtained the consent of the vestry to indemnify the magistrates; and they ought to take care that every part of the legal machinery is perfectly right, and capable of acting without exposing them to danger. I therefore am of opinion that the magistrates are quite justified in saying—“Whoever is right in point of law, there is the fact of exemption for forty years, and therefore we shall not do any act upon our own responsibility;” and they are justified also in refusing to act, from those doubts that arise with respect to the allowance of the rate and the non-performance of the statute-duty.

Under all the circumstances, therefore, I think we should be doing a very violent act in calling on these magistrates to issue a warrant of distress, when personal consequences to themselves would in all probability ensue.

LITLEDAL, J.—I am entirely of the same opinion. It appears that for a considerable number of years past the moor lands of the parish have not contributed to the highway rate. The inhabitants seem to have had some doubt among themselves, in consequence of which the moor lands were not included in the rate. For some reason, however, the persons in the other part of the parish thought those lands ought to contribute in aid of that highway rate, as well as the other lands in the parish. With this difference of opinion, it is not extraordinary that the rest of the parish should require the magistrates to rate those lands, and that the pro-

prietors of such lands should endeavour to resist that rate. The matter ought to have been put in a proper train of litigation as far as it could be done. If a rate had been made, either including or excluding these lands, the party who *was* dissatisfied might have appealed, and the sessions would have investigated the matter. It is not to be expected in such a dispute as this, that the magistrates will take upon themselves to decide it; but an appeal should be had to the sessions. That certainly would not have been final; but if the particular rate had been confirmed, the party interested in enforcing such rate, might afterwards have compelled the magistrates to issue their warrant of distress. If parties call upon magistrates to issue a warrant of distress to enforce the payment of a rate, the validity of which they acknowledge to be in dispute, they ought to take care to indemnify the magistrates against the consequences of an action. It ought, therefore, to be, not merely an *offer* of indemnity, or an *expectation* that the party would give it, but an actual *bonâ fide* indemnity; and if they had been assured that such an indemnity would be given, it is probable the magistrates might have issued their warrant. Instead of that, there is no actual offer of indemnity, but an intimation held out, on the part of Mr. Macey, that probably an indemnity would be given on the part of the parish. There are contradictory affidavits on that subject as to what the offer really was that was made by Mr. Macey; but this is clear—that no actual indemnity was offered. There seems to have been a reasonable doubt in the minds of these magistrates as to whether the rate was valid or not. I give no opinion as to whether the moor lands are to be rated or not; but if the magistrates have a *reasonable doubt*, until that question is settled I do not see how we are to compel them to issue this warrant of distress; for besides the general merits which are meant to be tried on this occasion, the magistrates, on being called upon to shew cause against a rule for a mandamus, may, on investigating the

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matter further, offer any number of formal objections which they consider to be deserving of consideration. I do not mean to say that the objections in this case are well founded, but on the part of the magistrates a great many objections to the form of the proceedings on this rate are offered. These are endeavoured to be answered by Mr. Erle; but the mode in which they are presented to the Court on one side and on the other, shews they are subjects *to be discussed*. Mr. Erle may be right in saying that the objections would turn out to be *unfounded*; but are the magistrates to be at the expense of litigating that? Though they are thought to be clear now, they may be the subject of much consideration; and in the end it is impossible to say whether they may turn out to be well founded or not. If *any* of these objections were good, the magistrates would be liable to an action, whatever might be the general merits of the case.

I think, under all the circumstances, that the rule ought to be discharged with costs.

WILLIAMS, J.—I am of the same opinion, and not little so in consequence of the fact that this is not the only mode of raising the question. The statute of *Geo. 3* seem to me to contemplate that questions of this sort should be decided by the Court of Quarter Sessions on appeal. The question might be raised in this manner with equal convenience, whether the rate included or excluded the debatable district.

The only doubt which I have had is as to the costs. Upon the whole matter, I think that as no indemnity was offered to the magistrates, they ought not to have been brought here, and that this rule, therefore, ought to be discharged *with costs*.

COLERIDGE, J.—I am quite of the same opinion with the rest of the Court. This Court, I apprehend, will never sanction a magistrate in abstaining from doing any act in

his office of magistrate on the ground of objections not sustainable, from a wish to evade a proper share of the responsibility attached to that office; but I apprehend that it is a settled rule of this Court, that where magistrates are acting with good faith, where they are threatened with an action, where there is no indemnity offered to them, and where there are reasonable grounds to suppose that such an action might be maintained with success, the Court will never compel magistrates to issue their warrant of distress, and subject themselves to that action.

Now in this case there is no ground for saying that there was any want of good faith on the part of the magistrates. Then, with respect to there being reasonable grounds for apprehending an action, it appears that they have been threatened, and also that no satisfactory offer of indemnity has been made to them. My opinion does not proceed on the supposed exemption of the moor lands. I do not think the Court are sufficiently in possession of all the circumstances to be able to decide that point. As far as I have formed any opinion about it at present, I should incline to think that the general liability clearly attaches upon those lands; but of course I express no opinion upon that at all. It appears to me that there are undoubtedly several objections *sustainable in point of argument*, and that is a sufficient answer to this application. The Court is not called upon to pronounce any opinion upon them. One objection I would mention, because I would not be supposed to assent to the argument of Mr. Erle respecting it. I refer to the construction put by him upon the 45th section of 13 Geo. 3, c. 78. This is the case of a large district in a parish in which nothing whatever has been done in the way of calling out the statute-duty; and I cannot at present subscribe to the doctrine that the magistrates can in such case be warranted in directing an assessment.

I quite agree that the rule ought to be discharged; and I think that as the magistrates have been improperly brought

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here, and brought at a considerable expense, they ought to have their costs.

Rule discharged with costs (a).

(a) And see *Underhill v. Elli-* Ryl. 334. and 9 Barn. & Cresaw.
combe, Maclel. & Younge, 450; 479; *ante*, vol. iii. 70; *Carlton*
Chaunter v. Glubb, 4 Mann. & *High Dale*, Ex parte, *ante*, 313.

The KING v. The Inhabitants of WICKHAM.

To prove a settlement by estate in the parish of A. it is competent to the parish of B. to produce a deed, purporting to convey land in the parish of C., and to shew by parol that such land is situate in A.

UPON appeal against an order of two justices, whereby *Thomas Thorn* and his wife were removed from the parish Wickham, in the county of Southampton, to the parish of Boarhunt, in the same county, the Court of Quarter Sessions quashed the order, subject to the opinion of this Court, upon the following case:

Thorn's settlement was derived from his father, *Thomas Thorn*, senior.

1815. By deed of feoffment, (with livery of seisin indorsed,) after reciting a legal title in *Daniel Moore* and *Thomas Matthews*, and an equitable title in *Thomas Russell*, in consideration of 77*l.* 12*s.*, paid by *Thorn* to *Russell*, *Moore*, at the request of *Russell*, gave, granted, aliened and enfeoffed unto *Thorn*, All that piece or parcel of land allotted by certain commissioners to *Moore*, situate and being between Lady's Pond and Pound's Farm, in the west walk of the forest of Bere, in the parish of Southwick, in the county of Southampton, bounded as follows; that is to say, on the north-east by lands allotted by the said commissioners to *Alexander Adams* and *Henry Haydon*,—on the west by land allotted by the said commissioners to the Right Hon. Lord *Powerscourt*,—on the south by the remainder of the allotment to *Moore*,—and on the east by a highway called Crooksgate Road, and certain allotments awarded by the said commissioners to the Vicar of Porchester and others. And *Matthews*, at the like request of *Russell*,

gave, granted, aliened and enfeoffed unto *Thorn*, all that piece or parcel of land allotted and awarded by the said commissioners to *Matthews*, adjoining to the said piece or parcel of land thereinbefore granted or enfeoffed, situate and being between Lady's Pond and Pound's Farm, in the west walk of the forest of Bere, in the parish of *Southwick aforesaid*, containing by admeasurement 2R. 10P., and bounded as follows, that is to say, (here the abutments were set out, but without any further mention of the name of the parish in which the allotments, which formed the subject of the conveyance to *Thorn*, or in which any of the neighbouring properties were situate,) To have and to hold the same, with the appurtenances, to *Thorn*, his heirs and assigns.

The consideration money mentioned in the conveyance was bonâ fide paid by *Thorn* to *Russell* agreeably to the deed, livery of seisin was duly made, and *Thorn* continued in possession and in seisin of the premises so purchased by him, and resided for forty days and upwards, in the parish of *Boarhunt*, after the said purchase.

The respondents then tendered parol evidence, for the purpose of shewing, that the land described in the above-mentioned deed of feoffment, and intended to be conveyed by such feoffment, and of which livery had been made, was in point of fact wholly situate within the parish of *Boarhunt*, and not in the parish of *Southwick*, and that "the parish of *Southwick*," if intended as a description of the situation of the land purchased, had been inserted by mistake and misapprehension in the deed, instead of "the parish of *Boarhunt*."

The appellants objected to the admissibility of such evidence, on the ground that it was not competent to the respondents to vary the description of the property, as contained in the deed of feoffment, and that parol evidence cannot be admitted to contradict or vary the terms of a deed.

The Court of Quarter Sessions allowed the objection, and rejected the evidence, as being repugnant to the description of the premises contained in the deed.

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The question for the opinion of the Court is, whether such evidence was admissible.

Rawlinson, in support of the order of sessions. The only point to be argued is, whether the respondents, who had put in the deed to prove the conveyance of the land in the particular parish, could contradict that deed by parol, in the most material part of it. In fact, whether a party can be allowed to make use of a deed for one purpose, and shew it a nullity as regards another purpose. [Lord Denman, C. J. Is it not impossible to contend, that this evidence to prove where the land was actually situate, should not have been received. If the parish officers, who are no parties to the deed, could not prove the real situation of the premises, what would be easier than for persons to convey an estate describing it as situate in a wrong parish.] It is not probable that a purchaser would willingly have an estate conveyed to him with an erroneous description of the property; *Rex v. Cheadle* (a). To permit this evidence to be given, would be to go beyond *Millar v. Travers* (b) in which the doctrine of the admissibility of parol evidence to controul a written instrument, was most fully gone into before *Tindal*, C. J., Lord *Lyndhurst*, C. B., and Lord *Brougham*, C.

Smirke, contra, was stopped by the Court.

PER CURIAM—

Order of Sessions discharged (a).

(a) 3 Barn. & Adol. 833. And see ante, iii. 50, 222.

(b) 8 Bingh. 244; 1 Moore & Scott, 342.

(c) And see *Peirson v. Pounteys*, Yelverton, 135; dictum per *Willes*, J., in *Macbeath v. Haldimand*, 1

T. R. 181; *Robertson v. French*, 4 East, 135; *Doe d. Brown v. Brown*, 11 East, 441; *Whitbread v. May*, 2 Bos. & Pull. 593; *Doe d. Le Chevalier v. Huthwaite*, 3 Barn. & Alders. 632.

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ASSUMPSIT, by the drawer against the acceptor of a *bill of exchange*, dated 28th December, 1833, for *19l. 3s. 5d.*, payable two months after date. The declaration also contained counts for goods sold and delivered, and upon an account stated. The defendant pleaded,—as to the first count, that the plaintiff had, since the acceptance of the bill, and after it had been issued and was complete, to wit, on the same day, without the privity of the defendant, and without the bill's being re-stamped, altered the bill in a material part, viz. by altering the date from 30th December, 1833, to 28th December, 1833;—as to the second count, that an account had been stated between the plaintiff and the defendant, and that a bill at two months had been drawn by the plaintiff, and accepted by the defendant, for the amount found to be due, viz. *19l. 3s. 5d.*;—and as to the third count, non assumpsit.

Where a bill of exchange, drawn and accepted for value, is altered by the drawer, and thereby becomes void, the drawer may, after the day of payment has passed, in case of dishonour, sue the acceptor upon the original consideration.

The plaintiff entered a nolle prosequi upon the first and third counts; and to the second plea replied, that before the commencement of this suit the bill in the second plea mentioned became due, and the defendant did not then, or at any other time before or since the bill became due, and before the commencement of this suit, pay the said sum of money in the said bill of exchange mentioned, or any part thereof.

Rejoinder, that after the defendant accepted the said bill in the second plea mentioned, and after the same had been issued and was complete, to wit, on the 30th December, 1833, the plaintiff, without the privity or assent of the defendant, and without the said bill's being re-stamped, altered the said bill in a material part, to wit, by altering the date thereof from the 30th December, 1833, to the 28th December, 1833.

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General demurrer, and joinder (a).

Busby, in support of the demurrer. The alteration of the date of the bill vitiated the security; but the plaintiff has a right to sue for the original consideration, viz. goods sold and delivered. There are only two classes of cases in which, by the alteration of a bill of exchange, the party altering it loses all right of action. The first is, where the action is brought by the indorsee against the acceptor, or against a remote intermediate party. There, the only privity between the parties is by means of the bill; and consequently when that privity is destroyed, which is the case if the bill be altered, the right to sue is destroyed with it. The second class is, where the action is brought by the indorsee against the drawer or indorser from whom he received the bill. In that case the indorsee is not permitted to recover for the original consideration; because, by the alteration of the bill, the drawer and indorser are deprived of all remedy over against the prior parties. *Alderson v. Langdale* (b) was a case of that kind, and was decided upon that ground. *Sutton v. Toomer* (c) is precisely similar to the present case. There a promissory note had been altered by the maker in the payee's presence. The consideration for the note was money lent; and the Court held, that though the note had become void by reason of the alteration, the right of action remained for the money lent. Besides, the rejoinder does not state when the alteration was made. It may therefore be assumed that the alteration was made after the bill of exchange became due and was dishonoured. After maturity and dishonour, the plaintiff might have burnt it, without losing his right to recover for the original con-


(a) The marginal statement of the point to be contended for on the part of the plaintiff was,—that the alteration, by the drawer, of a bill of exchange, accepted for the price of goods sold by him to the

acceptor, does not operate in satisfaction of the debt for which the acceptance was given.

(b) 3 Barn. & Adol. 660.

(c) 1 Mann. & Ryl. 125; 7 B. & Cressw. 416.

sideration. The defendant has had the full benefit of the time for which the bill was given; for the action was not brought till after the dishonour.

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Wightman, *contra*. It is admitted that there is the distinction between this case and *Alderson v. Langdale*, which has been pointed out. The rejoinder is therefore bad. But the replication does not shew any good reason why the plaintiff should be permitted to resort to the original consideration. It does not appear that the bill was ever presented to the acceptor. It is true that it is not necessary for the holder of a bill to present it to the acceptor; but if a party chooses to *indorse* a bill, he cannot give the bill the *go-by*, and sue for goods sold and delivered. Where a bill is outstanding, and never presented to the acceptor, it would be hard if the acceptor had to pay the bill and also for the goods delivered. If the plaintiff was himself the holder, he should have sued on the bill. [Lord *Denman*, C. J. Should not this have been rejoined?]

Busby was not called upon to argue in reply.

By the COURT—

Judgment for the plaintiff (a).

(a) A bill of exchange, drawn by the creditor on his debtor, creates no *merger*; it merely suspends the right of action during the period for which the bill is drawn, and in which it shall be outstanding in the hands of third persons. Though the wrongful act of the drawer, in vitiating the bill and destroying the remedy on the bill, could not place him in the same situation as if no bill had been

drawn, and by removing that out of the way which suspended the original right of action, remit him to his former immediate right of demanding payment,—yet it effectually destroys the power of *indorsing over*. The suspension of the right of action, for goods sold, would therefore necessarily terminate at the expiration of the period for which the bill was drawn. Vide *Davis v. Gyde*, *post*, 462.

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PITT v. WILLIAMS and another, Executors of
THOMAS FOSTER.

A. and *B.*, lessees of a coal mine, *A.* being also lessee in trust for himself and *B.* of land adjoining, necessary for the working of the mine, covenants with *C.* that he will do nothing whereby an annuity, charged (with power of entry upon the mine &c. and sale, in case the annuity should be in arrear) upon the profits which, after payment of the rent, taxes, &c. then charged thereon, might be made under the leases of the mine and land, by the sale of the coal or otherwise, may be impeached.

In an action on the covenant, *C.* assigns as breaches—first, that *A.* surrendered the land, and took a new lease to himself and *B.* jointly, in trust for other persons,—whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it; secondly, that *A.* and *B.* accepted a new lease of the land at an increased rent, and, in other respects, upon less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land upon terms less advantageous to *A.* and *B.*,—whereby the annuity became and was impeached; thirdly, that *A.* and *B.* assigned (amongst other things) such neighbouring mine and the land *D.*,—whereby the annuity became and was impeached.

Held, that the declaration was insufficient, for not shewing in what manner the annuity complained of operated to impeach the annuity.

In an action on a covenant to do no act whereby an annuity charged upon the profits of a coal-mine shall be impeached, it is no ground of demurrer that the declaration does not allege that any profits have been made.

Quere, whether such omission would disentitle the plaintiff to recover more than nominal damages.

In an action to recover arrears of the annuity, such allegation in the declaration would be required.

THIS case was, in Easter term, elaborately argued by *Campbell*, A. G., for the defendants, and *Cowling* for the plaintiff. The pleadings and arguments are fully stated in the judgment of the Court, delivered in this term, by

Lord DENMAN, C. J., as follows:—This is an action of covenant upon an indenture, dated Dec. 2nd, 1816, and made between the plaintiff, of the first part—*Colmer*, of the second part—the deceased *Foster*, and *Bonner* and *Gaunt*, of the third part—*Bowser*, of the fourth part—and said *Gaunt*, and *Bowser* the younger, of the fifth part.

This indenture is set forth at length in the declaration, and recites several other instruments, by which it appears that *Bowser* originally held certain coal mines and premises under leases from Sir *Hugh Owen* and Lord *Cawdor*, for long terms of years; that he assigned a moiety of them to *Farquharson*, who granted an annuity of 778*l.* to the plaintiff, and assigned his interest in the premises to *Colmer*, as trustee for the plaintiff, to secure the annuity, with a power of sale; that *Bowser* afterwards assigned one-fourth of the premises to *Foster*, *Bonner*, and *Gaunt*, retaining one-fourth

himself; that *Gaunt* held an agreement from Lord *Ashburnham*, dated 8th August, 1816, to which *Foster* and *Bonner*, as sureties for *Gaunt*, and also *Bowser*, were parties, for a lease of land to be granted to *Gaunt* for sixty years, as soon as he should have completed a shipping place on the land, (which land is stated in the indenture to be essential and absolutely necessary for working and carrying off the coal and culm to be wrought and raised out of the colliery and premises;) that *Gaunt* had covenanted and declared that he held the same agreement in trust for the joint use and benefit of the said *Gaunt*, *Bowser*, *Foster*, and *Bonner*, as tenants in common; that the annuity was in arrear, and the plaintiff had given notice of his intention to exercise his power of sale; that *Foster*, *Bonner* and *Gaunt* had agreed to purchase the moiety which the plaintiff was about to sell, upon the terms that that moiety should be discharged from the annuity of 778*l.*; and that *Foster*, *Bonner*, and *Gaunt* should grant to the plaintiff an annuity of 1138*l.* during his life, payable out of the three-fourth parts or shares of *Foster*, *Bonner*, and *Gaunt*, in the profits, benefits, and advantages, and sums of money which, under the thereinbefore recited indentures and articles of agreement, or otherwise, might from time to time be made, accrue, or be produced from or by sale of the coal or culm to be wrought or dug out of the said mines and veins, or seams of coal or culm, or otherwise howsoever.

The indenture then assigns to *Foster*, *Bonner*, and *Gaunt*, the moiety vested in *Colmer* as trustee, so that they became owners of three-fourths, *Bowser* remaining owner of the other fourth; and grants the annuity of 1138*l.* to the plaintiff. It then contains assurance by *Foster*, *Bonner*, and *Gaunt*, each for himself, his heirs &c., severally only, with the plaintiff, that they and their respective executors &c., would, by and out of the said three-fourth parts or shares of the profits, &c., which under the said thereinbefore in part recited indentures of lease, and said agreement of the

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8th August, 1816, and the powers, provisoes, covenants and agreements therein respectively contained, might be made, accrue, or be produced, by the sale of the coal and culm to be wrought and dug out of the said mines and veins or seams of coal and culm, as aforesaid, or otherwise howsoever, after payment of all rates, taxes and impositions taxed or charged thereon, or on the said mines or seams of coal and culm, and several lands and other premises; and also, after payment to the lessors, their heirs or assigns, of such yearly and other rent or rents as in and by the said several recited leases or agreements were reserved and which should come to their or any of their hands, pay the annuity by four quarterly payments, as therein described; and further, that if the annuity should be in arrear at the expiration of two years, or after those two years, for the space of twelve calendar months, the plaintiff might enter and take the said three-fourth parts of the profits until paid; with a further power of sale or mortgage of the said three-fourth parts or shares in the mines and premises. The indenture then contains a several covenant by *Foster, Bonner, and Gaunt*, that they had not done or suffered any thing whereby the mines and premises, and the profits to be derived therefrom, were or could be impeached or incumbered in title, estate or otherwise; and then follows the covenant on which the plaintiffs declared:—that each of them the said *Bowser, Foster, Bonner, and Gaunt*, so far as related to his own acts and deeds, and not further otherwise, did for himself, his heirs, executors and administrators, covenant with the other and others of them, and also with the plaintiff, that the said *Bowser, Foster, Bonner, and Gaunt*, had not made, done, committed, or executed, nor would thereafter make &c., or permit and suffer, or cause or procure to be made &c., any act, deed, matter, or thing, whereby the annuity was, could, should, or might cease, determine, be impeached, or become void and of no effect; or whereby the same indentures of lease and articles of agreement, or any of them, was or were, or should

might be forfeited, and the terms of years thereby respectively created cease, determine, and become null and void.

The declaration then alleges, that although the lands and premises demised, or agreed to be demised, by the said articles of 8th August, 1816, from thence continually have been and still are essential and absolutely necessary for working and carrying off the coal and culm to be wrought and raised out of and from the said colliery and premises, which were and are of little or no value without such lands and premises; yet *Foster, Bonner, and Gaunt*, on the 28th February, 1820, without the knowledge or consent of the plaintiff, took and accepted in their own names, and not for the benefit of or in trust for the plaintiff, but for the benefit of and in trust for other persons, a lease of the said lands and premises, to hold to *Foster, Bonner, and Gaunt*, from the 25th June then last past, for sixty years; and also then forfeited, yielded, surrendered, and gave up the said articles of agreement, and all interest whatsoever conveyed, or intended and agreed to be conveyed thereby. By means whereof the annuity became and was impeached and of no effect, and all the powers, privileges, charges, rights, and interests, given and conveyed to the plaintiff as aforesaid, in, over and upon the lands and premises so demised, or agreed to be demised, to *Gaunt* by the articles of 8th August, 1816, and in, over, and upon the said articles of agreement, and also of and in the profits, &c. which, under the hereinbefore recited indentures and articles of agreement should and ought, and otherwise would have been made, accrue, and be produced, from and by the sale of coal and culm wrought and dug out of the said mines and veins, or seams of coal and otherwisc, then and there ceased and determined, and became and were utterly void and of no effect or value to the plaintiff, and the plaintiff then became, and was and still is, absolutely precluded from enforcing the payment of the annuity according to the provisions of the indenture.

The second breach of covenant alleges, that under and Second breach.

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near to the lands and premises demised, or agreed to be demised to *Gaunt*, by the articles of 8th August, 1816, and near to the colliery and premises originally demised to *Bowser*, and convenient for working the same, on 28th February, 1820, there were, and still are, valuable veins and seams of coal and other minerals, the property of Lord *Ashburnham*; and that *Foster, Bonner, and Gaunt*, intending to defraud the plaintiff, and craftily to obtain a lease thereof from Lord *A.*, on advantageous terms to themselves, and in breach of their trusts and covenants, seeking their own gain at the expense of the plaintiff, on 28th February, 1820, without his knowledge or consent, took and accepted a lease from Lord *A.* of the said lands and premises agreed to be demised by the articles of 8th August, 1816,—to hold to them, *Foster, Bonner, and Gaunt*, for different and less advantageous terms of years, at different and higher rents (*a*), and under and subject to different and less advantageous stipulations, conditions, and provisions, than the said term of years, rent, stipulations, conditions, and provisions, in the said articles of 8th August, 1816, agreed, and than might, and ought, and could, and otherwise would have been obtained from Lord *A.*; and that by means of such contrivance, *Foster, Bonner, and Gaunt*, did obtain from Lord *A.* a lease of such veins and seams of coal, on more advantageous and profitable stipulations than they ought and otherwise could have done. By means whereof the annuity became and was impeached &c., as before.

Third breach. The third breach of covenant alleges, that after the making of the two leases by Lord *A.*, as in the second breach mentioned, *Foster, Bonner, and Gaunt*, without the knowledge or consent of the plaintiff, assigned to *Charles Hill*, (amongst other things,) all the messuages, lands, grounds, veins of coal, and other premises, granted by those two leases, and all their interest in the thereby assigned property, for the residue of the several terms. By means whereof &c., as before.

(*a*) *Vide post*, 419.

To this declaration the defendants have demurred generally; and they contend,

First, that the declaration is insufficient, for want of stating that *any profits* have accrued from the working of the colliery.

Secondly, that the breaches assigned do not disclose any facts, by which the annuity is *necessarily impeached*.

With respect to the first point, we are of opinion that the declaration is sufficient. Assuming that in an action *to recover arrears* of the annuity, it would be necessary to state affirmatively that profits had accrued, inasmuch as the annuity is made payable *out of the profits*, if any,—yet in an action to recover damages for acts by which the annuity is said to be *impeached*, it cannot be necessary to state that profits have been made, unless it be with a view to shew the measure of those damages; and if it be necessary or proper, with that view, (which we are not called upon to determine,) the omission of the statement can at all events operate no further than to reduce the plaintiff's right of action to merely nominal damages, not to shew that he has no cause of action at all, and is not therefore matter of *demurrer*. It is also obvious that the acts complained of *may* have themselves been the *cause* that no profits were made; and again, if no profits have *hitherto* been made, yet it does not follow that they may not be made hereafter, so as to pay the annuity, if it be not impeached.

With respect to the second point we have felt considerable difficulty; but upon the whole we are of opinion that the breaches, as alleged, are not sufficient, and that the defendants are entitled to our judgment.

The first breach in substance states, that *Foster, Bonner, and Gaunt*, took a lease of the premises comprised in the articles of agreement of 8th August, 1816, in their own names, and not in trust for the plaintiff, but in trust for others, for sixty years, from 25th June, 1819, and forfeited and yielded up the articles. By means whereof the annuity became and was impeached and of no effect, and the

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First point:
Omission of
statement that
profits had
accrued.

Second point:
Omission of
statement of
mode in which
annuity was
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plaintiff lost his remedies to enforce it. Whatever be the meaning of the word "impeached" in this breach, it is stated as a consequence resulting from the facts previously stated. Now that consequence does not result from those facts, which do not in any way affect the annuity. It is quite immaterial as to the annuity, whether the lease was taken in the names of *Foster, Bonner, and Gaunt*, or in the name of *Gaunt* only, since *Gaunt* had covenanted to hold it when granted in trust for *Foster, Bonner*, and himself, and all three had covenanted with the plaintiff, not that it should be taken in trust for him, but that they had not done, nor would do, any thing whereby it might be forfeited. Now, as far as appears by the allegations in this breach, it is still a valid and subsisting lease, and the lands comprised in it capable of being used for the working of the colliery, on which the annuity is secured. The articles of agreement are indeed stated in the breach to have been *forfeited and yielded up*; but the use of the word "forfeited" is of itself nothing, without shewing *how* and by what act they were forfeited; and so far from this being shewn, the contrary plainly appears; and that they were yielded up only when the purpose for which they were made, namely, the granting a lease of the lands comprised in them, had been fulfilled.

Whether that lease is in strict conformity to the articles of agreement, or even whether it is a lease under and in pursuance of those articles, is not material, because *the annuity* is payable out of the profits of the mine, which under the indentures and articles shall accrue by working the coals, or *otherwise howsoever*. The plaintiff therefore has the security contracted for, viz. the profits of the mine, to the working of which these lands mentioned in the articles are necessary, whether the lease under which the lands are held be or be not conformable to the articles; and it does not lie in the mouth of the covenantors, who gave up the articles when they took the lease, to say that the lease differs from the articles, and that they are therefore ab—

solved from applying the lands to the working of the mine, or from paying the annuity out of the profits of the mine, supposing it to be worked by means of the lands.

The second breach states in substance, that *Foster, Bonner, and Gaunt*, in fraud of the plaintiff, accepted a lease from Lord *Ashburnham* on different and less advantageous terms, and at higher rents, than were specified in the articles of agreement, in order to induce Lord *A.* to grant them a lease of other coal mines on better terms than he otherwise would, and that he did so grant, whereby the annuity became and was impeached. The same observations may be made here as have already been applied to the first breach. Nothing is stated in this breach which in any way affects the title to the annuity, or to the premises on which it is secured, or the remedies by which it may be enforced, but only facts tending to shew that those remedies are less likely to be efficacious, by reason, as it is said, of the increase of a prior charge upon the funds, out of which the annuity is payable; for it is argued, that as the annuity is payable out of the profits of the colliery after payment of all rents, and as the rent reserved in the lease is higher than that stipulated in the articles, the funds out of which the annuity is payable, viz. the profits of the colliery, must pro tanto be diminished, and the payment of the annuity be rendered less likely, and so that the annuity is impeached. But on looking at the words of the covenant, it will be found that the annuity is payable out of the profits of the mine, after payment to the lessors of such rents as in and by the recited leases or agreements were respectively reserved. The covenantors therefore are only entitled to deduct from the profit prior to paying the annuity, such rent as is specified in the articles of agreement, not such as is reserved in the lease granted by Lord *A.*; and as Lord *A.* cannot distrain on the mine for his rent, but only on the land leased by him, the prior charges on the profits contemplated by the indenture on which this action is brought, are not increased. Whatever then be the meaning which

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is not affected by the assignment, and so the plaintiff has all the security which he contracted to have, viz. the personal covenant of the covenantors, and the power of entry and sale. The breach, therefore, cannot be supported on the second ground.

Judgment for the defendants.

—◆—
 The KING v. The Inhabitants of ST. NICHOLAS,
 COLCHESTER.

No settlement can be gained since the passing of 1 W. 4, c. 18, by the renting and occupation of a tenement by a party who allows an under-tenant to have the exclusive occupation of rooms in the tenement,—for however short a period such occupation may continue, and however small may be the sum paid in consideration of it.

Seemle, that a letting of rooms by an inn-keeper to his guests, is not such an underletting as would defeat the settlement.

UPON appeal against an order for the removal of *Sanders Sparrow*, his wife and family, from *St. James* to *St. Nicholas, Colchester*, the sessions confirmed the order, subject to the following case:—

By an agreement in writing, dated 24th March, 1831, the pauper and one *Hutchinson* hired a messuage in the parish of *St. Nicholas*, for two years, at the rent of 60*l.*, payable half yearly. *Hutchinson* was included in the agreement merely to guarantee the payment of the rent—the pauper only being intended to occupy the premises.

25th March, the keys were delivered to the pauper.

7th November, a distress was put in for the half-year's rent which had become due at Michaelmas, 1831, and the pauper's goods were sold under the distress by the bailiff, who, out of the proceeds, paid 30*l.* for the rent to the landlord who had employed him, and paid over the remainder, after deducting the costs of the distress, to the pauper.

At Lady-day, 1832, the pauper gave up possession, in pursuance of an agreement made with *Hutchinson*, under

The 1st section of 1 W. 4, c. 18, (though prospective only) applies to cases in which the occupation had commenced, but was not complete, at the time of passing of the act.

Seemle, That a discharge of rent, by means of a distress upon the goods of the tenant is a sufficient payment of rent by the party hiring the tenement, within 1 W. 4, c. 1 s. 1.

which the latter took exclusively upon him the liability to pay the arrear of rent due from the pauper.

During the year commencing Lady-day, 1831, and expiring Lady-day, 1832, three rooms in the said messuage were underlet by the pauper to Mr. D. W. Harvey, who had the exclusive occupation of them for three weeks, for which he paid 8*l*. The question is, whether the pauper gained a settlement in *St. Nicholas* or not. If he did, the order of sessions is to be confirmed,—if not, the order to be quashed.

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Ryland, in support of the order of sessions. It was contended at the sessions, that the pauper did not gain a settlement in *St. Nicholas*, for two reasons:—first, because the rent was discharged by means of a *distress*, and not by actual payment *by the pauper*; and, secondly, because the pauper had, during the time of his occupation under the hiring, *underlet* three rooms of the demised messuage. It is certainly required by 1 *W. 4*, c. 18, s. 1, that the tenement shall be actually occupied, and the rent *paid by the person hiring the tenement*. This case, however, is not within the operation of the statute; for the tenancy commenced on the 25th of March, 1831, whereas the act in question did not come into operation until the 30th of the same month; and *Rex v. Ruthin*(a) decided that the first section of 1 *W. 4*, c. 18, which contains the provision alluded to, is not retrospective. The only distinction between this case and *Rex v. Ruthin* is, that in the latter case the right to the settlement was *complete* before the act passed, whereas in this case it was *inchoate* only. But that inchoate right could not be affected by a provision which is prospective only. Assuming, however, that the act of 1 *W. 4* does apply, it is submitted that the payment in this case was a sufficient payment *by the person hiring the tenement*; for, although it is not actually paid by the tenant, it is paid out of the pro-

First point:
Where 1 *W. 4*,
c. 18, s. 1,
applies.

Second point:
Payment of
rent by dis-
tress.

(a) *Ante*, vol. ii. 97; 5 Barn. & Adol. 215.

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Third point:
 Underletting.

ceeds of his goods. [Lord *Denman*, C. J. It can scarcely be contended, that payment by distress is not payment by the party.] It was held in *Rex v. Carshalton* (a), that a discharge by distress *after the death* of the pauper, did not satisfy the statute; but it was admitted in the course of the argument, that if the distress had been made *before* the pauper's death, the statute would have been complied with. As to the second point:—This case is in some respects distinguishable from *Rex v. St. Nicholas, Rochester* (b). There the pauper underlet two-thirds of the house *by the quarter*, at the rate of 22*l.* per annum, the whole rent being 40*l.*; and the undertenant, for two quarters, occupied and lived in the tenement. Here, the underletting is of three rooms, for the short space of *three weeks* only; the party does not appear to have slept on the premises; and the sum paid for such occupation was no more than 8*l.* But, assuming that this case is similar to *Rex v. St. Nicholas, Rochester*, it is hoped that the Court will review their decision in that case, and overrule it, if upon consideration they should think it wrong. That decision goes to this extent; that no man, who underlets a single room for a single night during the year of his occupation, will gain a settlement by renting a tenement, however large may be the amount of rent which he pays. Upon this branch of the case, the argument which was offered to the Court in *Rex v. St. Nicholas, Rochester*, may, with the permission of the Court, be prayed in aid. [Lord *Denman*, C. J. We were ourselves startled at the consequences of the conclusion at which, nevertheless, we felt ourselves bound to arrive.] If the Court should decide that in this case no settlement was gained, it might be contended, that an occupation (in other respects good), by a master, would be rendered ineffectual for the purpose of settlement, if he agreed with his servant that, in consideration of a reduction of wages, the latter should have

(a) 9 Dowl. & Ryl. 132; 6 Barnw. & Cressw. 93.

(b) *Ante*, vol. iii. 21; 5 Barn — & Adol. 219.

a room in the house set apart for his exclusive use. All tavern-keepers, hotel-keepers, and lodging-house keepers, would, in like manner, be prevented from gaining a settlement. For if an underletting for three weeks would prevent a party from gaining a settlement, so would an underletting for three nights, or a shorter period.

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Knox, contrâ. The act of 1 Will. 4, c. 18, applies to this case. In *Rex v. St. Mary-le-bone* (a) it was held, that 59 Geo. 3, c. 50, by which an occupation of the tenement for twelve months was made necessary, applied to a person whose settlement was inchoate before the passing of the act. In that case the pauper hired a tenement of more than 10*l.* a-year value, and resided therein more than forty days altogether, but for only thirty-eight days before 59 Geo. 3, c. 50, came into operation; and the Court held that the pauper had gained no settlement. The occupation, in this case, was insufficient. The statute 1 Will. 4, c. 18, was passed to obviate the effect of the decisions in *Rex v. Ditchet* (b), *Rex v. Great Bentley* (c), and *Rex v. Kibworth Harcourt* (d). *Rex v. Ditchet* and *Rex v. Great Bentley* decided, that under 6 Geo. 4, c. 57, the occupation of part only of the premises demised, (the premises being of the yearly value of 10*l.*,) gave a settlement; and *Rex v. Kibworth Harcourt* decided, that payment of rent need not be by the party hiring the tenement. The statute 1 Will. 4, c. 18, therefore, requires that the premises shall be exclusively occupied and the rent for them be paid—by the person hiring the same. The occupation must, now, be an actual and exclusive occupation of a whole house or other premises of the yearly value of 10*l.* In *Rex v. St. Nicholas, Rochester*, the judges were unanimous; and that case is

First point.

Third point.

(a) 4 Barn. & Alders. 681.

(c) 10 B. & C. 520.

(b) 4 Man. & Ryl. 151; 9 Barn. & Cressw. 176.

(d) 1 M. & R. 691; S. C. 7 B. & C. 790.

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decisive of the present. In several of the cases put as showing the startling consequences of the decision in *Rex v. St. Nicholas, Rochester*, that decision could not apply; for the parties whose occupation is supposed to invalidate the settlement, could not be said to be undertenants with *exclusive occupation* of any part of the house. Here, it is expressly found that Mr. Harvey had the *exclusive* occupation of the three rooms. Then it is said that satisfaction of the rent by means of a distress is payment of the rent. If it be so held, the decision must be on the ground, that a *constructive* payment will satisfy the words of 1 Will. 4, which, it is submitted, was clearly not the intention of the legislature. The bailiff, who levies the distress, is not the agent of the tenant, but of the landlord. On the contrary, he acts against the will of the tenant. Therefore it is submitted, there was no *sufficient payment*, as well as no sufficient occupation to confer a settlement.

Lord DENMAN, C. J.—This is in truth a question whether *Rex v. St. Nicholas, Rochester*, was well decided; for the attempt which has been made to distinguish that case from the present, appears to me to fail. *Rex v. St. Nicholas, Rochester*, was decided after full argument, and upon great consideration, by my brothers and myself. At the same time, if there had been anything like a reasonable doubt raised as to the law having been improperly applied on that occasion, I am quite sure every one of us would have been willing to give the greatest attention to every argument that could be brought to shew us that we were wrong. I recollect that upon the former occasion every judge who gave an opinion felt that the consequences were such as the legislature had not contemplated, and such as might involve some inconveniences. But we found the words of the statute too strong to grapple with. I am ready to declare that where I find the words of a statute

perfectly clear I shall adhere to those words, and shall not allow myself to be diverted from the application of them by any supposed consequences of one kind or the other—as to which courts of justice are very often much deceived. The words of the statute (which came into operation on the 30th of March) are these: “that from and after the passing of this act no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said (recited) act expressed, unless such house or building or land shall be *actually occupied under such yearly hiring in the same parish or township, by the person hiring the same*, for the term of one whole year at the least.” The fact is found in this case, that during the year commencing at Lady-day 1831, and expiring at Lady-day 1832, several rooms were underlet by the pauper to Mr. Harvey, who had the *exclusive occupation* of them for three weeks, for which he had paid 8*l*. I find that this very case was contemplated by one of my brothers in the decision of *Rex v. St. Nicholas, Rochester*; and it was admitted that if *for any period* another person had the exclusive occupation of any part of the house, that would defeat the settlement; and it seems to me we should frustrate the object of the act if we said that under such circumstances the pauper would gain a settlement. Some difficulty is supposed to be raised by the case of *innkeepers*. I cannot say that I feel the difficulty, for there is no analogy between the occupation of a room by a guest, and the letting out to a person the exclusive occupation of a part of the house. The occupation in the former case is that of the innkeeper, who has a general control over the whole house, and who, in fact, occupies by means of his guest. I do not think that any doubt can be raised on that subject; nor do I think that any great inconvenience can result from any of the consequences which have been suggested. *Rex v. St. Nicholas, Rochester*, however, having been fully considered, and the words of

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the act completely warranting that decision, I think we are bound to say that in this case also no settlement was gained.


LITLEDALE, J.—I see no reason to depart from the opinion I gave in *Rex v. St. Nicholas, Rochester*; and I think that we are bound by that decision, and that this is not such an occupation as falls within the meaning of the act of parliament. Then the only question is, whether, the year having commenced prior to the passing of the act, the inchoate settlement can be affected by it? Now it appears to me that the words of the act being "that no settlement shall be gained from and after the passing of the act," which was the 30th of March, it clearly does apply to this case.

WILLIAMS, J.—I am of the same opinion. One of the reasons which induces me to abide by the decision in *Rex v. St. Nicholas, Rochester*, is, that I am quite satisfied of the truth of that which has been often said by learned judges, who have very well understood this subject, that it is as important, especially in cases of this sort, to abide by the rule of law when ascertained, as it is to determine the rule originally. Unless, therefore, I saw the clearest ground for doubting the correctness of the decision in *Rex v. St. Nicholas, Rochester*, I should certainly give my assent to that decision. It appears to me that it is perfectly consistent with the principles and objects of the acts which have been passed upon this subject. The 6 Geo. 4, c. 57, was introduced in consequence of the very expensive litigation occasioned by the then state of the law; and, in order to remedy this evil, that act confined the legal settlement by renting a tenement, by enacting that no person should acquire a settlement in any parish &c., by or reason of settling upon, renting, or paying parochial rates for any tenement not being his own property, unless such tenement consist of a separate and distinct dwelling.

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house or building, or of land, or of both, bonâ fide rented by such person in such parish &c., at 10*l.* a year for one whole year; nor unless such house &c. should be *occupied* under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid, for one whole year at the least. That at once got rid of much of the vexatious litigation which arose on the subject. After that act came the one upon which this question depends, (1 *Will.* 4, c. 18,) which is expressly stated to be "An act to explain and amend an act of the sixth of his late majesty, as far as regards the settlement of the poor by the renting and occupation of tenements." Now in what respect does it explain and amend it? It explains and amends it by still further abridging and curtailing the power of gaining settlements by renting a tenement, in conformity with the principles of the former act; and it accordingly says, that "no settlement shall be gained unless the house &c. shall be *actually* occupied under such yearly hiring *by the person hiring the same* for the term of one whole year at the least." It appears to me that the construction which was put upon those words by the Court in *Rex v. St. Nicholas, Rochester*, is the true and right construction. It has been said that this act ought not to have a retrospective operation. It is observable that the act does not affect the *contract*, but relates expressly to the *occupation*. It declares that after the passing of that act no settlement shall be gained unless an occupation of a particular sort shall take place. If the act had required a *contract* of a specific nature, an inchoate settlement by reason of an occupation under a contract valid at the time when it was made, would not have been affected by this. This case is, however, totally different. I therefore am of opinion, that those words "*actually occupied &c.*," which are studiously introduced into this statute, must point to an entire exclusive occupation; and if it does, we cannot enter into the question of degree—whether the underletting be of 10*l.* a year, or 5*l.*, or 50*s.* If there be a clear underletting by the party of any portion

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of the house, for however short a period of time, and for however small a sum, it seems to me that it cannot be said that there was an *actual* occupation of a separate and distinct dwelling-house by the party hiring the same. I should not have said so much upon this case if I had belonged to the Court at the time of the former decision.

Order of Session quashed.

PEER v. HUMPHREY.

The owner of goods stolen, who prosecutes the thief to conviction, is entitled to recover the value of them in trover, from a person who had purchased them from the thief, *but not in market overt*, and who had resold them in market overt after notice of the felony but before conviction.

TROVER for three oxen and a heifer. **Plea:** the general issue. The cause came on to be tried at the spring assizes at Northampton in 1834. A verdict was taken by consent for the plaintiff, subject to the opinion of the Court on the following case:—

24th August, 1832. Three oxen and a heifer, the property of the plaintiff, were by his direction delivered to one *Roundthwaite*, then a servant employed by him, to drive from Ashby-Saint-Legers to Northampton market. *Roundthwaite* drove away the cattle from Ashby, but instead of taking them to Northampton, he sold the three oxen to the defendant on the high road, (but not in market overt,) the same day, for 28*l.* 10*s.*,—which sum he received and absconded with. The purchase was made on the part of the defendant *bonâ fide*. The heifer was not sold to the defendant, but was left by *Roundthwaite*, together with the three oxen, in the possession of the defendant, under a contract of agistment, after a refusal on the part of *Roundthwaite* to sell the same to the defendant for the sum of 7*l.*

26th August, 1832. The plaintiff discovered that the said cattle were in the possession of the defendant, and on the same day he, the plaintiff, went to the defendant's house, and gave the defendant personally notice that the said three oxen and the heifer belonged to him, the plaintiff, and had

been feloniously stolen from him by the said *Roundthwaite*, as above mentioned; and the plaintiff at the same time demanded the possession of the said cattle, but the defendant refused to give them up.

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The oxen remained in the defendant's possession till the 26th of November, 1832, and the heifer till the 6th of February, 1833—on which days respectively the defendant sold and disposed of them in market overt—the oxen for 30*l.* 10*s.*, and the heifer for 10*l.* 15*s.*, and received and appropriated to his own use the price of each respectively.

Roundthwaite was afterwards apprehended and prosecuted by the plaintiff for feloniously stealing these cattle, and was duly convicted, on the prosecution of the plaintiff, at the summer assizes held at Northampton in July, 1833, and was, for such offence, transported for life.

If the Court shall be of opinion that the plaintiff is entitled to a verdict for the value of the oxen and heifer, then the verdict is to stand for the plaintiff with forty pounds damages—if for the value of the heifer only, then the verdict is to stand with 10*l.* 15*s.* damages—otherwise a nonsuit to be entered.

N. R. Clarke, for the plaintiff. The question as to whether there should be a nonsuit, may at once be put out of consideration, for it is quite clear that the plaintiff is at all events entitled to a verdict for 10*l.* 15*s.* He is also, it is submitted, clearly entitled to recover for the three oxen. The sale to the defendant not having been in market overt, and the thief having been subsequently prosecuted to conviction by the plaintiff, no property in the cattle passed to the defendant by the sale, and therefore the re-sale by him was a conversion, which entitled the plaintiff to maintain trover for the value of the cattle. *Horwood v. Smith*(a) decided, that a party who had bought stolen goods in market overt, and had resold them previously to the conviction

(a) 2 T. R. 750.

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of the thief, was not liable to be sued in trover, notwithstanding that the owner had given him notice of the robbery whilst the goods were in his possession; and it is probable that particular expressions in that case will be relied on as shewing that the decision was intended to be without reference to the fact of the sale having been in market overt. The decision in that case proceeds, however, on the ground that *a property in the goods* passed by the sale in market overt, and that the plaintiff's right to restitution, (which was created by positive statute) did not arise until after the conviction, previously to which time the defendant had sold the goods to another. In the case of a sale of stolen goods otherwise than in market overt, *no* property passes, and therefore the re-sale is a conversion. The liability or non-liability depends entirely upon the fact of the sale's being or not being in market overt. This distinction pervades all the authorities. *Parker v. Patrick*(a) is in point. There, goods were obtained from *A.* by fraud and pawned to *B.* without notice; *A.* prosecuted the offender to conviction and got possession of his goods. It was held that *B.* (the pawnee) might maintain trover for the goods; but it was said by the Court, that it would have been otherwise if the goods had been *stolen* from *A.*

Amos contra. The supposed conversion took place before the plaintiff's right to restitution of the goods vested. In the judgments of Lord *Kenyon*, C. J., and *Ashhurst*, J., in *Horwood v. Smith*, no reference is made to the fact of the sale's having been in market overt. Lord *Kenyon* says, "During the interval between the felony and conviction, the property remains *in dubio*, liable to be defeated by the attainder;"—now during that time the defendant purchased the goods in question. It is sufficient for the defendant if the property remained *in dubio*. In *Gimson v. Woodfall*(b),

(a) 5 T. R. 175.

(b) 2 Carr. & Payne, 41.

which was an action of trover for a mare, it appeared that the plaintiff had good reason to believe that the mare had been stolen by the party who sold it to the defendant; but although he had tried to recover back his property, he had done nothing towards prosecuting the felon. *Best, C. J.*, nonsuited the plaintiff, on the ground that if an action were permitted under such circumstances, there would be no criminal prosecution. That argument would apply to this case. In *Hale's Pleas of the Crown* (a) it is said, "If a man feloniously steals goods and before prosecution by indictment the party brings trover, it lies not—for so felonies should be healed (b)." From this it appears that *Hale* thought that the property was devested out of the real owner until conviction. In appeals of robbery, if any goods were omitted, those goods were confiscated to the king, *Hawkins P. C.* (c). This also shews that the property was devested. *Parker v. Patrick* is an authority for the defendant, for there the innocent pawnee was protected. If the plaintiff is allowed to recover, an injury will be sustained by the criminal justice of the country.

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N. R. Clarke, in reply. The only question is, whether the defendant acquired any property in the cattle by the sale to him. If he did acquire such property, then there is no distinction between a sale in market overt and one by private contract—which is contrary to the known principle of law. After a sale of stolen property in market overt, the property is *in dubio*, that is, liable to be defeated by the attainder; and if it do not remain in the hands of the vendee at the time of conviction, undoubtedly the owner cannot recover as against him. But by a private sale of goods feloniously stolen, the property is not devested out of the rightful owner.

Lord DENMAN, C. J.—I am of opinion that the property in the cattle was never devested out of the true

(a) Cap. 45, vol. i. p. 546.

3 Mann. & Ryl. 292 (a).

(b) *q. d.* "concealed," *vide* . (c) Vol. ii. p. 171. 4th ed.

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owner. The party who sold the property made himself a felon by that sale. For his felony he was brought to justice and convicted on the prosecution of the plaintiff, who has, therefore, done every thing which in any case has been thought necessary to entitle him to recover. The only difficulty, if there be any, arises from the expression used by Lord Kenyon, in *Horwood v. Smith*—that the property was *in dubio* between the felony and the conviction; but I think that was a hasty expression, or mistaken in the hurry of reporting; for the property is not *in dubio*, except between a sale in *market overt* and the period of conviction. It may be said to be *doubtful* in such a case whether the property passes, for a sale in market overt gives only a *prima facie* title to the purchaser. Some difficulty, perhaps, arises from the case of *Parker v. Patrick*, in which the Court says, that a fraud is not like a case of felony; which would imply that a fraud might pass the property, though a felony did not. Perhaps the whole extent of that was, that the Court did not on that occasion take a very correct view of the law, for it is certainly inconsistent with what has been said in a great variety of cases. However, we are not bound to enter into that consideration. The argument of Mr. Amos assumes that the Court were wrong in the distinction they there took, and that a case of fraud is the same as a case of felony for this purpose, and that consequently the decision there stands in the way of the decision we are coming to here. It seems to me, that the question of fraud is not before us. If it were, I cannot help thinking that we should be unable to support *Parker v. Patrick*, for the case of *Grimson v. Woodfall* is inconsistent with it. However, this is a case of felony, not merely of fraud, and consequently the property never has been divested, and the plaintiff is entitled to recover it, having done all that the law requires for that purpose.

LITLEDAL, J.—I also am of opinion that the plaintiff is entitled to recover. It is quite clear that the person who

sold to the defendant had no authority to sell: therefore, *prima facie*, the plaintiff would be entitled to recover against the defendant. Then the servant having committed a felony at the time that he was making the sale, the law says to the owner, "You shall not bring an action to recover your property until you have done what is required by the justice of the country—prosecuted the felon and convicted him." That has been done here. This case differs from *Horwood v. Smith*, for there the property was changed by a sale in market overt: Here it never was changed. The only way in which that case will apply is in shewing, that if a felony be committed, the plaintiff is bound to prosecute the felon before he can obtain restitution of his property. That has been done here; and, therefore, it is exactly the same thing as if the servant had sold to the defendant—not committing a felony at the time, but supposing he had authority to sell—and it turned out he had no authority; in which case, the sale not being in market overt, no property would pass, and the plaintiff would be entitled to recover.

WILLIAMS, J.—I am of the same opinion. I have no difficulty in this case, nor in construing the case of *Horwood v. Smith*, which only establishes, that a party who has purchased stolen goods in market overt obtains a right to those goods, according to the rule recognized as long as the law itself; and that if, having such right, he parts with those goods to another before the plaintiff has, by a conviction of the thief, acquired a new right under the statute, the owner cannot, even after the conviction, maintain trover against him. In this case, no property at all passed to the defendant, for the sale was in private and not in market overt. Consequently, the plaintiff is entitled to maintain this action.

Verdict to stand for 40*l.* damages.

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It is not necessary, in order to create a statutory exemption from poor-rates, that the act should in express terms exempt from such particular rates; but it is sufficient, if by fair construction of the words of the act, the exemption clearly appears.

Therefore, where in a local act (by which a company are empowered to make the river D. navigable, and to make new cuts through the adjoining lands,) it is

enacted, that the company "shall not be taxed or assessed for the navigation, or the profits thereof, at any place except the towns of A. and B.," where account books are directed to be kept:—the Court held, that an exemption from *poor-rates* in respect of lands taken for the purpose of the act, elsewhere than in A. or B., was created; and this although no part of the navigation is within the town of A.

And where by a subsequent local act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof, and empowering the company to make certain new cuts, and to receive additional tolls in consequence thereof, it was enacted, that the cuts should, when made, be considered and taken as part of the navigation of the river D., and that all the provisoes, directions, restrictions, penalties, and forfeitures, in and by the former acts, respecting the boatmen employed on the said river, the owners, commanders &c., of boats &c., or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts &c., as fully in every respect as if the said cuts &c. had originally been part of the river D. navigation, and had been inserted in the several acts:—Held, that the company were exempt from *poor-rates* in respect of land, not in A. or B., taken by them under the powers of this act, and used for cuts in lieu of parts of the old navigation.

The words, "shall, when made, be considered and taken as part of the navigation of the river D." are alone sufficient to extend to the new cuts the exemption from assessment which had previously existed in respect of the navigation generally.

UPON appeal by "The Company of Proprietors of the Navigation of the River Dun," a rate for the relief of the poor of the township of Barnby Dun, in the West Riding of Yorkshire, was quashed, subject to the opinion of this Court upon the following case:—

The river Dun navigation commences in Tinsley, two miles east of Sheffield, and proceeds in an easterly direction down the course of the river Dun to Holmstile in Doncaster, and thence in an easterly direction, through the township of Barnby Dun, to Fishlock Ferry, whence it communicates with the river Ouse.

By 12 Geo. 1, c. 38, "for making the river Dun navigable from Holmstile in Doncaster, to Tinsley, a township near Sheffield," certain persons were appointed undertakers of the navigation, and were empowered to make the river navigable from Holmstile to Tinsley, to make new cuts through the adjoining lands, and to receive certain rates and duties of tonnage.

By 13 Geo. 1, c. 20, "for improving the navigation of the river Dun from Holmstile to Wilsick House, in the

parish of Barnby Dun," similar powers are given to certain other persons as to this part of the river.

By 6 Geo. 2, c. 9, the two navigation companies are united into one by the name of "The Company of Proprietors of the Navigation of the River Dun," and all powers given to the separate navigation companies are vested in the united company. In this act is the following clause:—

"And be it further enacted, that the said company of proprietors, their successors or assigns, or any of them, *shall not be taxed or assessed for the same, or the profits thereof, at any place or places except Sheffield or Doncaster aforesaid;*"—at which places it was further provided that books of accounts should be kept.

Under 13 Geo. 2, c. 11, "for improving the navigation of the River Dun from Wilsick House, in the parish of Barnby Dun, to Fishlock Ferry," the navigation was continued to its present eastern extremity, and the Stainforth Cut (176 yards of which are in Barnby Dun) was made.

By 2 Geo. 4, c. xlvi., reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make and maintain other cuts or canals in lieu thereof, the company are empowered to make certain cuts or canals, with proper towing paths, and, among others, a cut or canal from the lower end of an existing cut at Barnby Dun, to the upper end of Stainforth Cut: And in consideration of the expenses of making such cuts &c., the company were authorized to demand and receive certain rates and duties over and above all other rates and duties allowed to be taken by the former acts: And it was enacted, "that the intended cuts or canals, alterations and works, should be considered and taken as part of the navigation of the river Dun, and that all and every the provisions, directions, restrictions, penalties, and forfeitures, in and by the thereinbefore recited acts (viz. the acts above-mentioned) and every of them, respecting the boatmen employed on the said river, the owners, commanders,

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masters, or rulers of boats, keels, or vessels, or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating thereto, or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the said cuts &c., as fully in every respect as if the said cuts &c. had originally been part of the river Dun navigation, and had been invested in the several acts." Under this act, the new cut in Barnby Dun was completed in 1830.

The navigation company is thus rated in the rate appealed against, the rate being at one shilling in the pound upon a sum of 173*l.* 5*s.*:—"The river Dun Company's new cut or canal, land covered with water, basins, towing paths, locks and tolls, and other works." No objection is made by the appellants to the amount at which they are rated, and indeed it is admitted that the rate is fair, supposing that the company are liable to be rated at all. The township of Barnby Dun is co-extensive with the parish. The navigation through the township consists entirely of land, the length of the several parts of it being as follows:—The old cut 308 yards, the new cut 3498 yards, part of Stainforth cut 176 yards, total in Barnby Dun 3982 yards, nearly 2½ miles.

The bed of the river is not used as a navigation. Previous to the completion of the new cut the company had been rated, and had paid rates in Barnby Dun upon a sum of 66*l.* 5*s.*

Upon the completion of the new cut, the company were rated upon 173*l.* 5*s.*, upon which assessment they have paid one rate. The company also, in December, 1831, paid a highway composition in Barnby Dun upon the same assessment. Land was purchased by the company for making the new canal in Barnby Dun. The company is rated, by mutual agreement, in the adjoining township of Kirk Sandal, upon 90*l.* It is also rated in the adjoining township of Stainforth and in other townships. It is not

rated in Sheffield;—indeed no part of this navigation is in the township of Sheffield; neither is it rated in the township of Tinsley, where it terminates. It is rated in the township of Doncaster upon 247l. 10s.

The entire length of the navigation of the river is 30 miles, of which length at least 12 miles are canals or cuts.

The questions for the consideration of the Court are, first, whether the company is liable to be rated in the township of Barnby Dun at all; and, secondly, if so liable, upon what sum, or in what manner, ought it to be rated in that township?

Pollock, A. G., in support of the order of sessions. The company is not liable to be rated at all; and as it is admitted that, if liable to be rated, they are not excessively rated, it is a mere matter of curiosity to inquire how they ought to be rated. Therefore the first only of the two questions submitted need be discussed. By 6 Geo. 2, it is enacted that the company shall not be taxed or assessed for the navigation, or the profits thereof, at any place except Sheffield or Doncaster; and therefore the only questions are, does the exemption extend to poor rates? and, if so, does it apply to the new works made under the authority of the act of 2 Geo. 4?

As to the first question, *Rex v. London Gas Company* (a) shews that the expression "shall not be taxed or assessed" &c., exempts from the payment of poor-rates.

Then as to the second question. By 2 Geo. 4, it is enacted, that the new cuts shall be considered and taken as part of the navigation of the river Dun; which is tantamount to saying (amongst other things) that the new cuts are to be subject to no other liability than the navigation of the river Dun had previously been subject to. [Lord Denman, C. J. The clause goes on to provide that all the powers and authorities in the former acts shall be appli-

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(a) 2 Mann. & Ryl. 12; 8 Barn. & Cressw. 54.

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cable to the new cuts as fully as if the new cuts had been originally part of the river Dun navigation, and had been inserted in the former acts.] It is evidently intended that the new works shall be considered as if they had been a part of the original navigation.

The Court (stopping Sir *J. Campbell* and *Milner*) called upon the opposite counsel.

Follett, S. G., *contra*. The question is, whether the parishes in which the new cuts have been made under the authority of 2 *Geo.* 4, are to be deprived of the right previously possessed of rating the lands used for these new cuts. The parishes have this right unless there be some clear exemption. In construing acts of this description the principle invariably adopted is, that to exempt the company from a burthen, and to deprive other parties of a benefit, the words made use of must be clear and unambiguous. By the statute of 18 *Eliz.*, all land is made ratable to the relief of the poor, and therefore exemption must be clearly made out. This clause can, upon examination, scarcely be deemed to create an exemption. The act was passed when the law was supposed to be different from what it is,—when *tolls* were supposed to be ratable; and it may fairly be taken that the legislature intended by the clause merely to exempt the company from a supposed liability to be rated for the *tolls*, and not to relieve the *land* from the burthen which it previously bore in common with all other land. If the old works are not exempt, of course then the new works are not so.

But supposing the old works to be exempt from poor-rates—the exemption is confined to those old works. Previously to the passing of the 2 *Geo.* 4, there were several acts in existence. In those acts penalties were imposed on persons doing damage to or obstructing the navigation, and regulations were made as to the passage of the boats on the canal, and as to the masters &c. of the boats. With

a view to extend the same right of control over the new cuts, it was, in 2 Geo. 4, enacted, that the intended cuts should be considered and taken as part of the river Dun, and that all the provisoes, directions, penalties, and forfeitures by the former acts respecting the boatmen employed on the river, the owners, commanders, masters, or rulers of boats, keels, or vessels, or other persons employed thereon &c., and all other powers and authorities therein contained, should extend and be applicable to the new cuts &c., as fully in every respect as if the said cuts &c. had been originally part of the river Dun navigation &c. If the legislature had intended the *exemptions* to be applicable to the new cuts, the word "*exemptions*" might easily have been used in addition to those of "*powers and authorities*." *Rex v. The Birmingham Canal Company* (a) is very similar to this case. The whole of Lord Tenterden's judgment in that case is closely applicable.

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The Court then called upon the counsel for the company to support the order of sessions.

Sir J. Campbell and Milner. The first point to be ascertained is, whether the navigation was exempt from *ratability* under the act of 6 Geo. 2, which enacts "that the said company of proprietors shall not be taxed or assessed for the same or the profits thereof." It is true that the words "the same" cannot be referred to any express antecedent, but upon looking at the whole of the preceding enactments, it is evident that the words refer to the whole of the old navigation. Therefore by this clause the old navigation, and also the profits thereof, (i. e. *the tolls*) are exempt from the liability to be rated to the relief of the poor. The old act having thus completely exempted the old navigation, the legislature may well be supposed to have intended that the new cuts to be *substituted* for parts

(a) 2 Barn. & Alders. 578.

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of the old navigation should in like manner be exempt. This consideration establishes a distinction between this case and that of *Rex v. The Birmingham Canal Company*, for there the parishes had a vested right to rate the land, and the works for which that land was used were not substituted for other works which had been previously exempted. In *Rex v. The London Gas Light Company* it was observed by Lord *Tenterden*, that the embankment sought to be rated might be beneficial in a peculiar manner to the parish. The navigation in this case may be highly beneficial to the parish, which, therefore, receives some consideration in return for its being deprived of the right to rate the land.

Follett, S. G., and Dundas, contra. The clause in the act of 6 *Geo. 2*, was only intended to apply to something which the legislature thought the company would be ratable for, viz. the tolls, which were then supposed to be ratable per se, although the river navigation could never have been of itself ratable. The Company may, under the act of 2 *Geo. 4*, take land which was previously ratable and use it for cuts; and if the land is then to become exempt from ratability, the parish is deprived of a vested right which they previously possessed. The principal words here used in the clause in 2 *Geo. 4*, which is supposed to extend the exemption, are "powers and authorities,"—words inadequate to constitute an *exemption*. Even if the word "exemption" had been actually inserted, it would have been insufficient if the context made the clause ambiguous. There are no words of positive exemption. The clause which is said to exempt the company is a mere police regulation. In *Rex v. The Birmingham Gas Company*, *Best, J.* says, "it is impossible to suppose that the legislature could have intended to grant them (the company) this exemption, without having distinctly stated such to have been their intention." If it has required all this argument to shew what was the intention of the legislature, the question cannot be free from doubt, and this is suffi-

cient to preserve the vested right of the parish. Under the 13 *Geo.* 2, the Stainforth cut was made, and there is nothing in that act which can be construed into an exempting clause. This shews that if it was intended by the legislature to exempt all the works from ratability, they have not adhered constantly to that intention.

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Lord DENMAN, C. J.—I confess that a good deal of doubt has existed in my mind in the course of this argument. I am so very unwilling that any of these cases should be decided on general views of utility, which may vary in every Court before which cases happen to come, that I am extremely anxious to see how the *words* of the statute will decide the case; and I think, that the words of this statute are sufficient to decide that this company is exempt from the payment of rates in respect of the land in question, which land was taken under the powers of the act of 2 *Geo.* 4.

It is true that words could hardly be less pertinent for the purposes which they really meant to carry into effect, than those employed in the first section of 6 *Geo.* 2, giving the exemption itself. They say, "That the company of proprietors, their successors or assigns, or any of them, shall not be taxed or assessed for the same, or the profits thereof, at any place or places, except Sheffield or Doncaster aforesaid," (those places at which the accounts were to be made up; but I think I cannot in any way connect the ratability with the mere making up of the accounts.) It seems to me, that though there are no words immediately preceding that clause, which can be properly referred to by the words "same or the profits thereof," yet we are bound to suppose the legislature must have meant by the word "same," such of the before-mentioned articles as were capable of producing profits that might be rated. In that sense we must hold that the words "taxed or assessed for the same" refers to the *navigation* which was regulated by this act of parliament.

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Then the question is, whether the exemption so given is extended by 2 Geo. 4 to those lands which the company is enabled to take for the purposes of that act? The object of that act is to enable the company to "abandon the existing navigation in certain parts, and to make other cuts in lieu thereof;" and the company are empowered to make such cuts, with proper towing paths and so forth, and among others the cut in question. Then in consideration of the expense the company shall be at in making the new cuts &c., they are allowed to take certain additional rates and duties; and then it is further enacted, that the intended cuts and canals, alterations and works, shall be considered and taken *as part of the navigation of the river Dun*. Then there are other words, as to the effect of which I think very considerable doubt may be entertained. These first words, however, appear to me to be sufficient to establish the right of the company to exemption in respect of their newly-acquired lands, just in the same way as if they had possessed them under the act containing the original exemption clause. For, when it is said "that the said intended cuts &c. shall be considered and taken as part of the navigation of the river Dun," we are then bound to say, that these cuts, being a part of the navigation of the river, the privileges of exemption, which the company possessed in respect of the original works, are conferred upon them in respect of those which are substituted.

[The Solicitor-General suggested, that there were parts of the navigation made between 6 Geo. 2, and 2 Geo. 4, which were admitted not to be exempt, and which had always been rated.]

At present the question is confined to the lands that were taken under 2 Geo. 4, and I am proceeding on the principle that those lands are distinctly substituted for, and put in the same situation as the lands that were exempted under the original statute.

It seems to me, therefore, that the sessions have done

right in quashing the rate, and that we must confirm their order.

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LITLEDALE, J.—I am of the same opinion. It seems to me that the original exemption in 6 *Geo. 2*, is sufficiently extensive to exempt this land from poor-rates, except so far as they are to be taken in Sheffield and Doncaster. It seems to be admitted, that the words, “taxed or assessed,” are sufficient to exempt from poor-rates, as was decided in *Rex v. London Gas Light Company*. If that be so, the question is as to the construction of 2 *Geo. 4*, which authorises the company to abandon certain parts of the existing navigation, and to make new cuts, &c., in lieu thereof. It appears to me, that as this cut was merely a substitution for what was before exempted, it ought to be governed by the same rules, and subject to the same exemptions. I do not mean to say that this would be so, if there were no clause in 2 *Geo. 4* enacting that the intended cuts &c. should be considered and taken as part of the navigation of the river Dun, &c. It is admitted that this clause does not in express words confer any exemption, but the question is, whether the effect of the whole of those words taken together, though the particular word is not used, does not give an exemption? It seems to me, that it gives exactly the same exemption as the previous statute gave as to the original works. Though, generally speaking, where the parish are entitled to rate any portion of land, that right is not taken away, unless there be some express reason for it, I do not apprehend that it is necessary to use in distinct terms the word “exemption.” If, upon a fair construction of the act, the exemption appears, the right of the parish to rate the particular land is effectually taken away, though the word “exemption” be not used. It seems to me, therefore, that as this cut is a substitution for the bed of the river, it is governed by the same rules as the original navigation,—and that the company are exempt.

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The KING v. The Inhabitants of WITNESHAM.

ON appeal against an order for the removal of *Robert Copping*, his wife and children, from the parish of Swil-land, in Hampshire, to the parish of Witnesham, in Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The respondents having established a settlement of the pauper in the appellant parish, the appellants proposed to shew that he had subsequently gained a settlement in the parish of Clopton. The facts proved by them were these:—A few days after Michaelmas, 1807, the pauper, being a single man, let himself to Mr. *Keen*, a farmer, of Clopton, in Suffolk, for a year, to commence at the Michaelmas-day following. The pauper went into the service accordingly, and stayed his time. He slept all the time at Clopton, and received his wages. A year and a half before the pauper entered into the service of Mr. *Keen*, he had been inrolled as a member of the Helmingham corps of volunteers, which corps was duly constituted according to the acts relating to corps of yeomanry and volunteers in Great Britain. During all that time, and throughout his year's service, the pauper duly attended muster, and was duly returned by the commanding officer as an effective member of the corps. He did not communicate the fact of his being a member of the corps to Mr. *Keen* until he had entered his service, nor did he ever give fourteen days' notice of an intention to quit the corps. He did not take the oath of allegiance according to 44 Geo. 3, c. 54, s. 20.

The sessions were of opinion that he was not *sui juris* at the time of letting himself to Mr. *Keen*, although he had not taken the oath of allegiance. If the Court shall be of that opinion, the order of sessions to be confirmed—otherwise, to be quashed.

A person inrolled as a member of a volunteer corps is not *sui juris* so as to be able to make a valid contract of service for a year.

It is not necessary in order to make a man inrolled as a volunteer, an effective member of his corps, that he should have taken the oath of allegiance required by the volunteer act—44 Geo. 3, c. 54, s. 20.

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Austin, in support of the order of sessions. Had the pauper taken the oath of allegiance, he clearly would not have been *sui juris* at the time of the hiring. *Rex v. Westerleigh* (a), *Rex v. Winchcomb* (b), *Rex v. Beaulieu* (c). The only question is—whether it was necessary, in order to constitute him an effective member of the volunteer corps, that he should have taken the oath of allegiance? The 20th section of 44 Geo. 3, c. 54, requires volunteers to take the oath of allegiance, but the words of that section are, it is submitted, *directory* only. Where the words of a statute are in the *affirmative* only, the act is *directory*. Thus, by the statute 25 Geo. 3, c. 84, s. 7, poll clerks are in specific terms required to take certain oaths, and yet this has always been considered as *directory*. In *Rex v. Corfe Mullen* (d) there was a question whether a man gained a settlement by executing the office of tithing-man for a year, he not having been sworn into the office by taking the oath which the court leet by which he was chosen, had ordered him, under a penalty of 5*l.*, to take within one month: and it was held that he gained a settlement. The Court observed, that “swearing in may be rendered necessary, either to enable the party to serve the office, or to impose a greater sanction on his discharge of it.” That case they considered to come within the latter view; and they likened the case to that of the churchwarden, concerning whom it was said to have been decided in an *anonymous* case, 1 *Ventris*, 267, that he may execute his office before he is sworn, though it is *convenient* that he should be sworn. It is submitted, that in *this* case the oath is required for the purpose only of imposing a greater sanction on the discharge of the duties of the volunteer, and that, therefore, the pauper was an effective member of the corps in which he was inrolled, although he had neglected to take the oath.

(a) Burr. S. C. 753.

(b) 1 Dougl. 391.

(c) 3 Maule & Selw. 229.

(d) 1 Barn. & Adol. 211.


Gurdon, contrâ. It must, perhaps, be admitted that the pauper was an effective volunteer, notwithstanding the omission to take the oath of allegiance; and, therefore, the question is, whether a *volunteer* is upon the same footing as a *militia-man*, who, it is admitted, is not *sui juris*. It is submitted that he is not so, and that a volunteer, inrolled under 44 Geo. 3, c. 54, was *sui juris*, and capable of entering into a contract of hiring. The *militia-man* may be arrested and compelled to serve, is subject to the articles of war, and may be treated as a deserter. He, therefore, has not the command of his time. But the *volunteer*, on the contrary, could not be compelled to train. His attendance was voluntary, and his non-attendance was punished only by a fine, to which each company, by rules and regulations of its own, agreed to submit, and the amount of which was fixed by themselves. The crown had no greater control over him than over any other subject of the realm. The volunteer act gave the crown authority to call out the volunteers to active service only in case of *invasion* by a foreign enemy. This is nothing more than the ancient prerogative of the crown as to *all* its subjects, as appears from *Blackstone's Commentaries*(a), *Hawkins P. C.* (b), and *Dalton's Sheriff*(c), and also from the preamble to the act for the defence and security of the realm(d), in which it is stated to be the "ancient and undoubted prerogative of the crown to require the military service of all the liege subjects, in case of an invasion of the realm by a foreign enemy." As this was the extent of the pauper's obligation, and as he contracted to do no more by becoming a volunteer than every person not infirm, between the ages of fifteen and sixty, was by the act last-mentioned compellable to do, he was capable of entering into this contract. [*Littledale, J.* Was not the volunteer under the control of his officers?] Only whilst under arms. If this pauper was not *sui juris*, every person

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WITNESHAM.(a) 1 Black. Com. 343; 4 Bl. C.
122.(c) 196, title, *Posse Comitatus*.

(d) 43 Geo. 3, c. 96.

(b) 1 Hawk. P. C. c. 22.

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above the age of fifteen and under sixty is in the same situation.

The Court called upon *Austin* to answer that argument.

Austin. The question seems to be, whether the pauper was less *sui juris* by the volunteer act, than by 43 *Geo. 3*, c. 96, the act for the defence of the realm. By the 22nd section of 44 *Geo. 3*, c. 54, volunteers, upon a general signal of alarm, are to assemble, and from that time may be deemed deserters, and are made subject to the mutiny laws. By sections 30 & 31 no volunteer is allowed to quit his corps without giving fourteen days' notice, and giving up his arms, and paying all fines due from him. There are likewise other statutes which give the crown greater powers over volunteers than it possessed, either at common law or by 43 *Geo. 3*, c. 96.

The Court granted *Austin* permission to refer to these on a future day.

Austin on another day referred the Court to 42 *Geo. 3*, c. 90, s. 99; 55 *Geo. 3*, c. 65; 55 *Geo. 3*, c. 168.

Cur. adv. vult.

On a subsequent day in the term,

LORD DENMAN, C. J., delivered the judgment of the Court.—The question in this case is, whether a person who was at the time a member of a volunteer corps, could gain a settlement by hiring and service? We have been referred to the volunteer act, (44 *Geo. 3*, c. 54,) to the act for the defence of the realm, (43 *Geo. 3*, c. 96,) and to the militia acts of 42 *Geo. 3*, c. 90, 55 *Geo. 3*, c. 65, and 55 *Geo. 3*, c. 168. It seems to us that the volunteer act puts a volunteer upon the same footing as a militia-man;

and that, by becoming a volunteer, the pauper in this case had put it out of his power to contract to serve his master during the whole year. This case, therefore, comes within the authority of the militia-man's case, in which it was held that no settlement was gained.

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Sir *John Campbell*, amicus curiæ. Lord *Erskine* wrote a celebrated book upon the subject, in which he came to the same conclusion.

Lord DENMAN, C. J.—We are glad to hear our opinion confirmed by that of so learned a person. We thought it strange that the question should never before have been considered.

Order of Sessions confirmed.

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 The KING v. FORD and others.

THIS was an indictment for an assault. The first count stated that the defendants, in the parish of St. James, Westminster, made a violent assault upon one *Scattergood*, who then and there being in lawful possession of certain goods and chattels which had been seized and taken possession of by *Thomas Denham*, collector of assessed taxes for the parish aforesaid, for the sum of 6*l.* 15*s.* 6*d.* for arrears of assessed taxes due from the said *Ford*, with intent to take the said *Scattergood* from and out of the possession of the holder in person, or that there should have been a direct refusal of payment to the collector in person. But it is sufficient if a demand have in fact been made by the collector or a person authorized by him, and the householder has refused payment, whether on the ground of inability or for any other cause.

Nor is it necessary that the collector should in the demand have specified the exact sum.

In order to authorize a levy under 43 Geo. 3, c. 99, s. 33, for arrears of assessed taxes, it is not necessary that those arrears should have been demanded by the collector in person upon the house-

Where a count in an indictment stated that the defendant made an assault upon a person who was in lawful possession of goods under a levy for a specified sum of money for arrears of assessed taxes, with intent unlawfully to force him out of possession,—Lord Denman, C. J., held that it was necessary to prove that the specific sum was due, although he thought that no sum need have been stated.

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said goods wrongfully and unjustly to force and expel and put out, &c. The second count was for a common assault on *Scattergood*. Plea; not guilty. The indictment, which was found by the Middlesex grand jury, at the Clerkenwell Sessions House, was removed into this Court by certiorari, and the prisoners were tried at the Middlesex sittings after last term, before Lord *Denman*, C. J. It then appeared that arrears of assessed taxes being due from *Ford*, *Denham*, the collector for the parish, in company with *Pollard*, whom he had duly authorized to collect taxes, called at the house of *Ford* for the purpose of demanding payment. *Ford* was from home; but *Denham* and *Pollard* saw at his house a woman, to whom they stated that they had come to demand payment of the arrears of the taxes, and that if they were not shortly paid, a distress would be put in. The woman said that *Ford* was unable to pay; and *Ford* himself shortly afterwards called on *Pollard*, and stated that he was unable to pay. *Pollard*, under the authority of *Denham*, made a levy upon the goods, &c. in *Ford*'s house, and put *Scattergood* into possession. Whilst he was so in possession, a violent assault (the subject of the present indictment) was made upon him by the defendants, with a view to compel him to abandon the seizure. It was objected to the first count of the indictment that it was not supported by the evidence, inasmuch as it was not shewn that the precise sum of 6*l.* 15*s.* 6*d.*, for which the distress was stated in the indictment to have been made, was in fact due. Lord *Denman*, C. J., thought that the sum need not have been stated; but that being stated, it could not be rejected as surplusage, but must be proved as laid. The first count being thus disposed of, it was objected that the evidence did not warrant a conviction upon the second count; for that the assault was justifiable for the purpose of putting *Scattergood* out of possession, unless he were shewn to have been legally in possession, which he could not be, unless there had been such a *refusal* on the part of *Ford* to pay the taxes, as required by 43 *Geo.* 3,

c. 99, s. 33. It was contended that under this enactment no levy could be made, unless there had been a direct refusal by *Ford* to the collector, upon a personal demand made by him to *Ford*, or upon a written paper containing such demand, having been left at *Ford's* house. For this position, the case of *Cullen v. Morris* (a) was cited. Lord *Denman*, C. J., however, over-ruled the objection, and told the jury that it was not necessary that there should be a refusal by the householder himself, and that it need not be to the collector in person, but that it was sufficient if it was made to any person properly authorized by him to collect,—if, in common language, there was a refusal to pay. The jury found that there had been a refusal to pay, and returned a verdict of guilty. On a day in this term, the prisoners being brought up for judgment,

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Humfrey moved for a new trial, on the ground of misdirection. The act (43 Geo. 3, c. 99,) gives to the collector power to levy only where payment of the assessed taxes is refused by any person "upon demand made by the collector or collectors of the division or place." In *Cullen v. Morris*, which was an action against the High Bailiff of Westminster, for refusing to receive the vote of the plaintiff at an election, on the ground that he had not paid his rates, *Abbott*, C. J., said, "There has been no personal demand of the rates which are due from him, and no written paper containing a demand of these rates has been left at his house, although an application has been made at the house. It appears to me therefore he had a right to vote." Here, there was no personal demand, nor any written paper, containing a demand by the collector, left at *Ford's* house, although an application was made at his house. If so strict a rule is to be observed under circumstances such as those in the case of *Cullen v. Morris*, à fortiori, ought it to be adopted in this case, for here the consequences of the refusal are more highly penal. Not only should the de-

(a) 2 Starkie, N. P. C. 577.

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mand have been personal, but also the sum claimed should have been stated.

Sir *John Campbell* elected to shew cause in the first instance. The point made, that there must be an express refusal to the collector in person, upon a demand personally made by him to the householder in person, is utterly without foundation. The language of the act is simply that "if any person shall refuse, upon demand made by the collector," then the collector may levy. It does not say in what manner the demand must be made by the collector, or in what way the party must refuse. If the argument on the other side were correct, then no levy could ever be made if the householder chose to keep out of the way. There can be no doubt that the demand and refusal were both sufficient. They would be sufficient in case of a motion for an attachment for non-performance of an award. The case of *Cullen v. Morris*, which was a case as to whether a voter was disqualified by non-payment of *rates*, has no bearing at all upon the question.

Humfrey, in support of his rule. The observation, that the act of parliament could not be carried into effect if the householder chose to keep out of the way, is met by the admission that, under the authority of *Cullen v. Morris*, a written demand, left at the house, would be sufficient. The demand of the servant is not sufficient unless it be shewn that she possessed the character of an agent. Such a demand would not be sufficient in the case referred to of an award. [*Littledale, J.* The act of parliament certainly does not require that the *refusal* should be made to the collector, but speaks only of refusal upon demand made by the collector. As far as the *refusal* goes, the case seems quite complete.] The *demand* was not sufficient. *Cullen v. Morris* is a strong authority in favour of the defendants.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day said—After considering the act of parliament and the case cited in the argument, we are of opinion that this application ought to be refused. It is not necessary that a demand should be made on the householder himself, or that the precise sum should be specified. A distress may be put in, if a demand of the taxes has been made, and there has been a refusal to pay on the ground of inability, or for any other reason. *Cullen v. Morris* relates to a matter totally different from that of the present case; and the principle of it is not, we think, applicable here.

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Rule discharged.

The KING v. The Inhabitants of CREGRINA.

UPON appeal against an order for the removal of *Septimus Lloyd*, his wife and children, from the parish of Cregrina to the parish of Glasscombe, both in the county of Radnor, the Sessions quashed the order, subject to the opinion of this Court on the following case:

Septimus Lloyd had, before 1830, acquired a settlement in Glasscombe, by renting a tenement in that parish. His father, *John Lloyd*, died in 1822, intestate, possessed of a leasehold tenement in Cregrina, which he held for the residue of a term of 999 years, at a pepper-corn rent, leaving a widow and four sons, viz. *John*, *James*, *Septimus* (the pauper), and *William*. On 4th August, 1828, administration was granted to *James*. By indenture, dated 23d August, 1828, between *James* (the administrator), *John*, *Septimus* (the pauper), and *William Lloyd*, and *Mrs. Guise*, the tenement was assigned by *James Lloyd* (the adminis-

A. being, with *B.*, *C.* and *D.*, next of kin to an intestate takes out administration, and then all four join in a mortgage of a leasehold tenement, in the parish of Dale, formerly the property of the intestate, and divide between them the money advanced. Subsequently *B.*, in consideration of a sum of money then paid, verbally agrees with *C.* to sell him all

his interest in the tenement, and, after a lapse of some time, joins *A.* and *D.* in releasing all their interest to *B.*:—Held, that *B.* did not, by a residence in Dale for forty days between making the agreement and executing the release, gain a settlement by estate in that parish.

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trator), and confirmed by *John, William, and Septimus Lloyd*, to *Mrs. Guise*, by way of mortgage, for the residue of the term, for securing 120*l.* and interest. The four brothers divided the 120*l.* equally among them, executed the deed, and signed the receipt; and covenanted for the re-payment to *Mrs. Guise* of the 120*l.* and interest. At the time of this transaction the pauper resided in *Glasscombe*. About a year afterwards, whilst residing in *Glasscombe*, he agreed verbally with his brother *William* to sell him all his interest in the leasehold tenement, in consideration of *William's* paying the pauper's share of the 120*l.* and all interest due and to grow due, and of the sum of 2*l.*; which 2*l.* was allowed to the pauper by *William*. About a year after making this agreement, the pauper removed into a cottage in *Cregrina*, and continued there until his removal under the order, but did not interfere with the leasehold tenement. In September, 1832, *William Lloyd*, on behalf of himself and of his brothers *James, John, and Septimus*, gave a written notice to *Mrs. Guise*, that at the expiration of six months the principal and interest on her mortgage would be paid off. By indenture, dated 29th April, 1833, *John, James* (the administrator), and *Septimus* (the pauper), in consideration of 30*l.*, released and assigned all their interest in the leasehold tenement to *William Lloyd*. No money passed to the pauper; *William Lloyd* claiming and retaining the pauper's fourth share, under his bargain made three years before, and having received and retained the intermediate rent accruing in respect of such fourth share.

Biggs Andrews in support of the order of sessions. The pauper was, at the time of his residence in *Cregrina*, possessed of a distributive share in the equity of redemption; and an *equitable* estate is sufficient for the purposes of settlement. Although the legal estate in the term had, by the administration, vested in *James Lloyd* alone, yet after

the assignment by way of mortgage, in which all the brothers joined, and by which all equally covenanted to repay the 120*l.* and interest, the equitable right to compel the mortgagee to re-convey the term upon repayment of the 120*l.* and interest, vested equally in all. The agreement of the pauper with his brother for the sale of all his interest in the leasehold tenement, was a mere verbal agreement, and was not executed until three years after; before which time he had resided for more than forty days in Cregrina.

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Adolphus, contrà. At the time of the residence of the pauper in Cregrina, he had parted with all interest in the leasehold premises to his brother. The agreement, though verbal, having been followed by payment or allowance of the 2*l.*, was sufficient to pass whatever equitable interest the pauper may have possessed (*a*).

LORD DENMAN, C. J.—The legal estate was in the administrator. The pauper had at one time, after the execution of the mortgage deed, an interest in the equity of redemption, which interest he parted with by his agreement to sell to his brother. He could clearly have no equity after the agreement. I am therefore of opinion that the order of sessions cannot be supported.

LITTLEDALE, J. and WILLIAMS, J., concurring,

Order of Sessions quashed.

(*a*) As to the cases in which payment of part of the price will, in equity, take a verbal contract out of the statute of frauds, see *Barlett v. Pickersgill*, 1 Eden, 516; *Main v. Melbourn*, 4 Ves. jun. 720; *Clinan v. Cooke*, 1 Schoales & Lefr. 40.

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tained, because the amount of the purchase money is not known; but, if it be assumed that the whole 15,000*l.* was given for the leasehold interest, the ad valorem stamp may easily be calculated. If it be said that there will be a failure of justice if the Court does not interfere, the answer is, that it was the duty of the *Company* to require the jury to assess the value of the leasehold interest separately from the amount of the damages; and that they, having neglected to do so, cannot now treat the verdict as a nullity, on the ground that the verdict is for an entire sum.

Follett, S. G., and *Wightman*, contra. By the 46th section of the act, the Company are obliged to purchase *all* the land of this individual, if they require any portion of it. It is only a small portion of it that they can use for the railway. The rest must be sold by them, or lie useless; and for the purposes of sale they must be able to shew a valid conveyance to themselves. Now the 39th section, which gives the form of the conveyance to the Company, requires that the sum given by them for the land shall be stated. But as the jury have neglected to ascertain separately the sum to be paid for the purchase of the interest in the land, the amount of the consideration cannot be stated in the conveyance; nor, consequently, can the ad valorem duty be ascertained and paid. A valid conveyance cannot therefore be executed. It operates as a wholesome check on the jury to require them to ascertain the value of the land, and assess the amount of compensation for injury, separately.

LORD DENMAN, C. J.—I think that it was the duty of the Company to call upon the jury to ascertain and settle what parts of the sum awarded by them were applicable to the several items of claim. What is the inconvenience that is to result from the finding being in its present form? That the Company do not know how to put a value on the

property. But is the *claimant* to have his verdict put in jeopardy in consequence of that? I certainly think not. I cannot understand how it could be the duty of the claimant's counsel to attend to the apportioning of the sum of money awarded. His duty was merely to get as large an amount as the jury would give him. There certainly has been some informality in the proceedings; but I think that we ought not to grant a mandamus upon such a ground as I have stated.

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 COMPANY.

LITLEDALE, J.—It occurs to me that to obviate the difficulty about the ad valorem duty on this part of the property, the whole matter should be specially recited in the conveyance, and the consideration for conveying be stated to be “the sum of 15,000*l.* so paid as aforesaid.” I dare say the claimant will undertake to pay the ad valorem duty, and then no injustice will be done.

Thesiger stated that the party was willing to assent to that proposition.

LORD DENMAN, C. J.—That will be the best end of the matter. It seems to me that it is impossible to treat the proceeding as a nullity, and that it would be very hard to cast upon the claimant the miscarriage of the other side.

WILLIAMS, J., and COLERIDGE, J., concurred.

Rule discharged.



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DAVIS v. GYDE.

A promissory note, given by the tenant to his landlord for rent, does not of itself suspend the right of distress until the note is due.

Quere, Whether, to an avowry for rent, an agreement to take a promissory note as accord and satisfaction, could be pleaded in bar:

Or an agreement to suspend the right of distress until a note taken for the rent should become due.

REPLEVIN. Avowry for 11*l.* 5*s.* for rent. Pleas in bar, first, non tenuit; and secondly,—as to 10*l.* 10*s.*, parcel of the 11*l.* 5*s.*, that before the time when &c., to wit, on the 7th of April last, the plaintiff made his promissory note, and thereby promised to pay to the defendant at a certain time, which had not yet elapsed &c., 10*l.* 10*s.*, and the defendant then received the note for and on account of the said sum of 10*l.* 10*s.*, and the defendant at the said time, when &c., held the said note for the said sum of 10*l.* 10*s.*,—and as to the residue, *riens* in arrear.

Demurrer to the second plea, and joinder.

R. V. Richards in support of the demurrer. The plea is bad; for the statement that a promissory note has been given for the rent, is not a sufficient answer to an avowry for the rent. Rent is of the degree of a *specialty* debt, and cannot therefore be extinguished by a security which creates only a *simple contract* debt. The point now before the Court was expressly determined in *Harris v. Shipway*, cited in Buller's *Nisi Prius*, 182 a, where it is laid down that a note given for rent due, does not extinguish the landlord's right to *distrain*. *Curtis v. Rush* (a). Supposing that the note might be taken as accord and satisfaction, it should have been pleaded accordingly.

Knowles, *contra*. This is not a question to which the doctrine of *extinguishment* has any relation. The question is, whether, by taking a promissory note, the plaintiff's right of distress has not been satisfied, or, at all events, suspended until the period at which the note will become due. If the law be that a landlord may take a promissory note or other negotiable security for rent, and before the

(a) 2 Ves. & B. 416.

note become due distrain for the same rent, then great injustice will follow to the tenant, who may thus be obliged to pay the amount of the rent twice over. The passage from *Butler* does not decide the question; for in the case there cited, it may be inferred that the note had become due, and had been dishonoured,—in which case the right to distrain would *revive*. In *Kearslake v. Morgan* (a) a plea similar to the present was demurred to, and adjudged to be good. Even if the note was not a *payment*, still the taking of it operated as an agreement on the part of the landlord, to *suspend* his right of distress until the period when the note should become due. That the right to distrain may be suspended by agreement, appears from Lord *Ellenborough's* observation in *Skerry v. Preston* (b). The circumstances disclosed by this plea operate in law as such an agreement.

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R. V. Richards in reply. No doubt where a bill of exchange is given for a *simple contract* debt, it suspends the right of action; and for this only is *Kearslake v. Morgan* an authority. The question is, whether the taking of a promissory note suspends the right to distrain for *rent*, which is a debt of as high a degree as a specialty. The maxim of law is, *nihil tam conveniens naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est*. If it is admitted that rent is of a higher degree than a simple contract debt, the taking of the promissory note should have been pleaded either as *payment* or as *accord and satisfaction*. The plea does not shew whether the note became due before or after the rent accrued. The only case where the taking of a promissory note can be pleaded to an action, is where the original right of action is a simple contract debt. In Rolle's Abr., title "Debt" (c), it is said, "So if the lessor accept an obligation for rent due upon lease for

(a) 5 T. R. 513.

(b) 2 Chitty's Rep. 245.

(c) 1 Roll. Abr. 605; 7 Vin. Abr. 367.

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years, this does not extinguish the rent, inasmuch as the rent is higher, being *real*; for law cannot be waged of it."

LORD DENMAN, C. J.—*Gage v. Acton* (a) decided that a debt due upon a bond may be set off against rent, because the latter is a debt of equal degree with the former. Here, the promissory note being a debt of an *inferior* degree to the rent, the receipt of the note can have created no extinguishment of the rent. Assuming that the note might operate as a *suspension* of the right to distrain, that should have been pleaded. *Kearslake v. Morgan* is inapplicable. In that case the liability of a *third party* was in question. Here the promissory note was given by the same party who was liable to the distress. There is no averment that the note was taken as accord and satisfaction, supposing that it could be so treated. The plea is therefore insufficient.

LITLEDALE, J.—I am of the same opinion. *Gage v. Acton* determined that rent is in the nature of a *specialty* debt. Assuming, then, that it is to be considered as a specialty, the question is, whether the acceptance of the note in this case may be pleaded as an agreement to *suspend* the right of distress. In Comyns's Digest (b) it said, that in debt on contract the defendant may plead bond given for the same debt, but he cannot plead another bond given in satisfaction to debt upon bond. In *Hford v. Andrews* (c) it was determined, that to debt bond conditioned for payment on a certain day, a plea the plaintiff gave a longer day of payment, was *Mease v. Mease* (d), and other cases which are there

(a) 1 Salk. 325; 1 Comyns's Rep. 67; 1 Lord Raym. 515; Freem. 512, 515; Carth. 511; Lord Holt, 309; 12 Mod. 290.

(b) Pleader, (2 W.) 46.

(c) Cro. Eliz. 697.

(d) Cowp. 47.

serve to shew that you cannot plead a *parol agreement* to extend the time for the payment of a *specialty* debt.


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WILLIAMS, J.—In this plea no answer to the defendant's right to distrain is disclosed. If the promissory note was accepted *in satisfaction* of the rent, that should have been pleaded. We can only consider the legal effect of a promissory note, given by the tenant to the lessor, upon the right of the latter to distrain. The only question which the plaintiff can put to the Court is, whether the taking of the promissory note *suspends* the right of distress until the note becomes due. I do not think that the matter of the plea is sufficient to shew a suspension of the right to distrain. The plea ought to have set out an *agreement* between the parties that the note should have that effect.

COLERIDGE, J.—I am quite of the same opinion. It is not contended that the matter of the plea amounts to an allegation of a *payment* or of an *extinguishment* of the debt; but it is argued that the taking of the promissory note amounts to an *agreement to suspend* the right of distress. I do not think that we can say that it does amount to such an agreement. It is very possible that it was so intended by the parties; but this is not the *necessary* legal effect of the transaction. If it was so intended, it should have been pleaded.

Judgment for the defendant.



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HOLDER v. RATH.

The Court has no power under 43 Geo. 3, c. 46, s. 3, to award costs to the defendant, except in cases where the plaintiff has recovered, by judgment only, a less amount than the sum for which he had arrested the defendant.

ASSUMPSIT for goods sold. The defendant was arrested for 180*l.* The plaintiff's demand was for 220*l.*, which was resisted on the ground that the defendant had been an infant at the time of supplying the goods, and that those goods were not necessities. Before issue joined the matters in dispute were referred to an arbitrator by a judge's order, in which it was specially directed that the costs of the action, of the reference, and of the award, should abide the event of the suit, *in like manner as upon a verdict*. The arbitrator awarded to the plaintiff 55*l.* Upon an affidavit stating the above facts, and adding that the insertion in the order of the special words relating to the costs had been procured by consent, with a view to a application of this nature, Crowder obtained a rule to shew cause why the defendant should not be allowed his costs under 43 Geo. 3, c. 46, s. 3.

Therefore they have no jurisdiction under this statute in cases in which the recovery has been by an award, upon a reference before issue joined.

So, although in the order of reference it is expressly agreed that the costs of the action, of the reference, and of the award, shall abide the event of the suit in like manner as upon a verdict.

Dubitatur, if in

F. Kelly now shewed cause. It is an old established rule, founded upon several decisions, that the Court has no power to award costs to the defendant under 43 Geo. 3, c. 46, s. 3, except where there has been a recovery by verdict of less than the amount for which he arrested the defendant. It has been decided that in cases of arrest the Court have no power under the statute. The act are, "wherein the plaintiff shall not recover more than the amount," &c.; and it has been held that as means "recover by verdict and judgment," the words apply to cases in which there has been no judgment. In this case there was not nor could there be a judgment should be entered up for the costs of the Court under the statute.

a verdict and judgment, for the reference was before issue joined. In addition to the difficulty which arises from the use of the word "recover," there is also this other difficulty arising from the latter part of the section—that the mode in which the Court is authorized to interfere pre-supposes a judgment; for if the sum recovered exceeds the amount of the defendant's costs, the plaintiff is to take out *execution* for the difference only; and if the defendant's costs exceed the amount recovered, he is to have *execution* for the excess of the costs above the sum recovered. Therefore, supposing even that the Court were willing to depart from the authority of all the previous cases, they would have to point out some new mode of carrying the provision *into effect*, for there could be no *execution* where there had been no *judgment*.

Here he was stopped by the Court.

Crowder, in support of his rule. The special words relating to the costs were introduced for the very purpose of bringing this case within the operation of the statute, and create an essential difference between this case and that of *Keene v. Deeble* (*a*), in which no words of this sort occur. It must be admitted that if those words had not been introduced, the defendant would have no *locus standi*; but these words, it is submitted, have the effect of placing the parties in a similar situation, with reference to the provisions of this statute, as if there had been a verdict and judgment. The only question seems to be, whether the parties *can*, by consent, place themselves in such a situation. [*Littledale, J.* The Court has power to interfere only in cases where there has been a *judgment*. Therefore if the parties intend that the Court shall have power to interfere, they must agree that *judgment* shall be entered up for the amount awarded.] If the agreement is not

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(a) 5 Dowl. & Ryl. 383; 3 Barn. & Cressw. 491.

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allowed to have its intended effect, great injustice will be done to the defendant.

LORD DENMAN, C. J.—The defendant has not taken the proper means for securing himself, by giving power to the Court to interfere under this statute. I very much doubt indeed whether the Court would *accept* the power, if the parties had clearly agreed that the Court should treat it as a case within the provisions of the statute.

LITLEDALE, J.—These words do not reserve to the Court the power of interfering under the statute. The order should have reserved it in express terms;—the parties should have agreed that *judgment* should be entered up;—they should have *referred* to the statute particularly. And, after all, I doubt much whether the Court would have interfered under this act of parliament, even if the parties had done as I have suggested. It is to be observed also, that if the Court were, in any case, to interfere, their order must necessarily be confined to the *costs of suit*, which alone are mentioned in the statute, and which, in cases in which the matters in dispute have been referred to arbitration in an early stage of the cause, are in general but an insignificant part of the costs incurred.

WILLIAMS, J.—*Keene v. Deeble(a)*, which has never been over-ruled, is quite decisive of this case.

Rule discharged.

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REECE v. TAYLOR and another.

TRESPASS for an assault and false imprisonment, and for carrying the plaintiff from a certain house and shop through the public streets to a police office. Pleas: first, not guilty; and secondly, by the defendant *Taylor*, that he was lawfully possessed of the house and shop, and that the plaintiff was unlawfully therein making a great disturbance against the will of *Taylor*; that *Taylor* requested him to depart, which he refused to do, whereupon *Taylor* gently laid hands upon him to remove him out of the house and shop; that thereupon the plaintiff, in the presence of a police officer, assaulted *Taylor*, upon which *Taylor* gave him into custody, and caused him to be carried from the house and shop along the public streets to the police office. Replication: *de injuriâ*. At the trial before Lord *Denman*, C. J., at the Westminster sittings after the last term, it appeared that *Taylor* was in the possession of the house, and that the plaintiff was unlawfully there, and was asked to depart; that upon his refusing to do so, *Taylor* called in a policeman, who, under the directions of *Taylor*, and upon a charge for an assault, conveyed the plaintiff to the police office; but it was not shewn that any assault had been in fact made by the plaintiff on the defendant. The learned judge thought that the defendant *Taylor* was justified in removing the plaintiff from his house, but that he had failed to shew a justification of the taking through the streets to the police office, and that therefore the plaintiff was entitled to recover damages in respect thereof. The jury found a verdict for 50*l.* damages. In the early part of this term,

To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office. Replication, *de injuriâ*. The defendant proved all the matters of the plea, except the assault by the plaintiff:—Held, that the plaintiff was entitled to recover damages for the imprisonment.

Maule moved for a new trial. The learned chief justice was wrong in directing the jury that the plaintiff might recover in respect of the taking to the police office. That was matter of excess, and in order to enable the plaintiff to recover in respect of it, should have been replied by way of

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Upon issue taken on a plea of son assault demesne, it is necessary to prove an assault commensurate with the trespass sought to be justified.

new assignment. Under *de injuriâ*, the plaintiff could not recover for this excess. [Williams, J. Your general replication puts in issue all the facts of the plea. Now, in that plea, there is a statement of an assault *by the plaintiff* on the defendant, in the presence of a policeman, which statement is necessary to justify all the trespasses complained of in the declaration, except the mere removing out of the house. You failed in proving that. Was not this good ground for the plaintiff having damages? Lord Denman, C. J. I acted upon the ground which my brother mentions.] It is not denied that the plaintiff shewed a right to recover damages—as far as the question depended upon the *evidence*—for the assault may not have been commensurate with the justification; but the argument now submitted to the Court is, that upon the *pleadings*, the plaintiff was debarred from recovering for this *excess*, for that it ought to be *replied*. [Littledale, J. The observations of the judges in *Cockcroft v. Smith* (a), amount to this, that under the plea of son assault demesne, the defendant must shew an assault by the plaintiff *commensurate* with the act complained of by the plaintiff. According to what is there said, you cannot *sustain your plea* of son assault demesne, unless you shew a *commensurate* assault.] That is so, but the defect cannot be taken advantage of unless the plea be properly replied to. [Littledale, J. I admit that the practice is with you.] In *The Six Carpenters' case* (b),—[Littledale, J. That case does not at all turn upon the manner of pleading.] Excess is *affirmative* matter, and must be averred by replication. Upon these pleadings the plaintiff was entitled to judgment for the whole matter or none. [Williams, J. The defendant having failed to prove all the facts in the plea, which were necessary to justify the trespass complained of, is not the plaintiff entitled to damages? Can you make it a ground of complaint, that the part of the trespass which was in fact justified, was withdrawn by the learned judge from the consideration of the jury?

(a) 1 Salkeld, 641.

(b) 8 Co. Rep. 146.

Lord Denman, C. J. There are clearly two distinct sets of facts complained of, and two distinct parts of the justification. The possession of the house was a justification of one only, and therefore in respect of the other, which was not justified, the plaintiff was entitled to damages.] It was all done at once, and constituted but one trespass—not justified to the full extent, it is admitted—but still it was but one act of trespass. [*Littledale, J.* You are bound to prove the whole of the allegations in your plea, or so much of them as constitutes a defence to the action. This you have failed to do. *Williams, J. Spilsbury v. Micklethwaite (a)* decides, that where two facts are pleaded, which are equally of themselves defences to the action, proof of one is sufficient. But here, the assault which you failed to prove, was a necessary part of the defence. You have not supported your plea. *Littledale, J.* It was incumbent on you to prove the assault, in order to shew that you were warranted in imprisoning the plaintiff. Until you have proved the allegations in the plea, you cannot raise the question of excess.]

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PER CURIAM—

Rule refused.

(a) 1 Taunt. 146.

—◆—
 In the matter of OLIVER.

A Rule had been obtained, calling upon Mr. *Oldaker*, an attorney of this Court, to shew cause why the paper-writing made by him, and signed by *Anne Oliver*, should not be delivered up to be cancelled, and why he should not pay the costs of the application.

From the affidavits upon which the rule was obtained, it appeared that the rule was obtained by her by default of the tenant in possession, and to allow the question of title to be fairly tried as between her and the attorney's client, landlord of the tenant in possession,—the Court compelled him to give up the instrument to be cancelled.

Where an attorney had obtained, from an aged lady, in the absence of her attorney, her signature to a paper whereby she agreed to

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appeared that *Mrs. Oliver*, having brought an ejectment to recover a small piece of land, lying between a part of her estate and a common highway, obtained judgment by default, and issued a writ of possession. *Mrs. Oliver's* property was entirely managed by an agent, and he gave instructions for the commencement of the action, and managed it with little communication with *Mrs. Oliver*, who, it was stated, had not even been informed of the result.

Mrs. Oliver in her affidavit stated that she was seventy-five years of age, and that on the 5th of July two gentlemen called upon her at the residence of her sister, one of whom was *Mr. Oldaker*, the other *Mr. Woodward*, the steward of *Sir John Sebright*; that one of them said they had called respecting the piece of land, the boundary of her farm, and that they thought it better to let the deponent know that there were proceedings taking place in favour of *Sir John Sebright*, who claimed to be entitled to the piece of land as lord of the manor of Battenhall; that deponent had really no claim to it, and that she could not retain it, and that it would be putting deponent to very great expense, and asked her if she would not give it up; if not, that the proceedings could not be delayed beyond deponent's answer that evening. That deponent, being taken by surprise, and very much agitated, proposed to them to go to her solicitor, but *Mr. O.* objected that they could not wait there whilst she went for that purpose; that she then promised to go to her solicitor as early as eight o'clock on the Monday morning following; to which *Mr. O.* answered that would be too late, for he had to write to London the next day, as the judges were to hear it before they set off on their circuit. That deponent being very reluctant to give them any answer without advice, and hesitating to do so, they said "we see you are cautious: we do not wish to lead you into any thing wrong." That *Mr. O.* then took some paper out of his pocket, and deponent having furnished him with pen and ink, he wrote something to the effect, as deponent believes, that depo-

ment consented to give up the proceedings as to the land recovered in the action of ejectment. Mr. O. then said, that if she chose to proceed again, the paper she had signed would not prevent her. That fearing the expense of law proceedings, and not knowing further the purport of the paper, she signed it.

It appeared from other affidavits, that Messrs. *Bedford* and *Pidcock*, attorneys to Mrs. *Oliver*, had demanded that the paper so signed by her should be given up to them by Mr. *Oldaker*, but that he had refused to do so. Mr. *W.* and Mr. *Oldaker* knew at the time of their going to Mrs. *Oliver's*, that Messrs. *Bedford* and *Pidcock* were her attorneys, but no intimation of any intention to obtain Mrs. *Oliver's* signature to the paper in question was at any time given to them, nor had they ever received notice of any application to set aside the proceedings in the action of ejectment.

Affidavits in opposition were sworn by Messrs. *Oldaker* and *Woodward*, and by *Richard Goodman*, (the tenant in possession under Sir *J. Sebright*,) and others. In these affidavits strong circumstances were stated in support of the claim of Sir *J. Sebright* to the spot of ground recovered by Mrs. *Oliver*, and the following facts were deposed to. The declaration in ejectment on the demise of Mrs. *Oliver* had been served on *Goodman*, who being an ignorant man, and not understanding the nature of the paper, had laid it aside, and had never mentioned the receipt of it to Sir *J. S.* or to any other person. Mr. *Woodward* accidentally discovered that the spot of ground had been recovered in the ejectment by Mrs. *Oliver*, and he then gave instructions to Mr. *Oldaker* to take measures for setting aside the judgment, and to let in Sir *J. Sebright* to defend the action. Mr. *Oldaker* in consequence prepared affidavits to ground a motion to the Court, and went to Worcester, in the neighbourhood of which the spot of ground was situate, with the intention of obtaining from *Goodman* the

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particulars of the facts relative to the service &c. of the declaration, so as to enable him to complete the affidavits. *Oldaker* there met *Woodward*, and they being at that time unable to find *Goodman*, went together to *Mrs. Oliver*, who was then at the residence of her sister near Worcester. In reply to questions put to her by *Woodward*, *Mrs. Oliver* said that she had always thought that the land did not belong to her, and had told her attorney so, but that she had been advised to bring the ejectment. *Woodward* then told *Mrs. Oliver*, that he had directed *Oldaker*, the attorney for Sir J. S., to take measures for bringing the question as to the right to the land to a fair investigation, and that he had come over to obtain affidavits to ground an application to the Court to set aside the proceedings, which must be done immediately, and the papers sent to London on the following day, lest the judges should be leaving town for their circuits. *Mrs. Oliver* then again told *Woodward* that she considered that the land did not belong to her; that she would rather not go to law, as she had no money to spend in law; and that if it would prevent further proceedings, she would write *Woodward* a note, or give him a memorandum that the proceedings then taken by her should go for nothing, and that *Goodman* should be considered as still in the possession of the land, the same as he was before the ejectment was brought. *Oldaker* then observed, that if *Mrs. Oliver* thought proper to make any such arrangement, it would of course be without prejudice to any claim she might have had prior to the ejectment. *Mrs. Oliver* did *not* propose to go to Worcester to take the advice of her solicitor, either on that day or on the following morning, but she stated that she should see him either on the Monday or the Tuesday following. *Mrs. Oliver* said she certainly considered the case a hard one upon Sir J. S., and expressed her willingness to adopt the course proposed, and immediately procured a pen and ink and asked *Woodward* to express what she should write. *Wood-*

ward then requested *Oldaker* to draw out a proper memorandum, which he accordingly did. This memorandum, (set out in the affidavit,) which, after having been read and approved by *Mrs. Oliver*, was signed by her, was in substance as follows:—That the declaration served on *Goodman*, the judgment obtained thereon, and the writ of possession issued, should be rescinded; and that *Goodman* should remain tenant to Sir *J. S.* as theretofore; and that the title to the premises should be adjudged and determined without reference to the proceedings which *Mrs. Oliver* thereby agreed to abandon. *Mrs. Oliver* did not appear at all agitated or taken by surprise. No observation was made by either *Woodward* or *Oldaker* as to *Mrs. Oliver's* being cautious, or of their leading her into any thing wrong; nor did *Oldaker* refer to any papers which he had with him, until *Mrs. Oliver* had herself proposed to give the note or memorandum before stated, which she did voluntarily and without any persuasion on the part of either *Woodward* or *Oldaker*. If *Mrs. Oliver* had not made this arrangement, it was *Oldaker's* intention to have gone the same evening to *Goodman's* house, for the purpose of obtaining from him the requisite affidavit. *Oldaker*, when called upon to give up the paper to *Bedford* and *Pidcock*, had offered to shew it to them, or give them a copy of it, if they required it.

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Follett, S. G. and *F. Kelly*, in shewing cause against the rule, brought the facts of the affidavits in opposition to the notice of the Court.

R. V. Richards supported his rule.

LORD DENMAN, C. J.—I think that this rule ought to be made absolute. Here is an attorney going with a paper in his handwriting, to which, in some way or other, he obtains the signature of this old lady; by which she, having

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recovered in an action of ejectment and obtained a writ of possession, acknowledges that she has no right to the land, although she says that in a short time she shall have an opportunity of consulting her attorney. The practice of the officers of this Court would be very impure and often fraudulent, if we permitted things of this sort to be done. Certainly the attorney on the other side ought to have been consulted, and without that I think the party ought not to have been asked to sign the paper.

LITLEDALE, J.—I am of the same opinion. I do not think it was a very correct thing for an attorney to go to an old woman and get her to sign a paper of which she did not probably understand a word. How was it to be expected that she could exercise any judgment upon it?

WILLIAMS, J.—I am of the same opinion. It does not appear to me to be at all clear that this woman had not a real claim to this small strip of land, and at all events, if this case was capable of explanation, it might have been explained on her making a *prima facie* case in the ejectment. There was no pretence of any collusion on her part with *Goodman*, and that being the case, this old woman of seventy-five signs this paper, of which she probably did not understand a word, and certainly not the effect.

Rule absolute.



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PERRING v. KYMER.

FOLLETT, S. G. applied to have a rule nisi to set aside an award, which he had obtained the day before, drawn up as upon reading an additional affidavit which had not yet been sworn, but which it was intended to obtain if the Court would grant the application. He had made the motion for the rule nisi in the idea that the affidavit (the substance of which had been stated to him) was sworn, and under this impression he had mentioned to the Court certain of the facts intended to be deposed.

Upon a statement of counsel that he had moved for a rule to set aside an award under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the Court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening.

Lord DENMAN, C. J.—I certainly think that there is good reason to abide by the general rule, that the affidavits must all be prepared at the time of making the motion to the Court. However, if your affidavit is made and filed to-night it may perhaps do (a).

The other Judges concurring,

Leave given.

(a) The rule would be drawn up as having been pronounced on the day on which the affidavit was sworn, not as having been pronounced on the day on which the

motion was originally made, as otherwise the rule would appear to have been granted before the Court had any ground for so acting.

The KING v. The Inhabitants of AXBRIDGE.

ON appeal, an order by which *Richard Hooper* was removed from Axbridge to Chapple Allerton, Somerset, was quashed, subject to the following case:—

terminable on lives at a nominal rent, who, at the commencement of such holding over, falsely asserts that one of the cetteux que vies is alive but omits to pay the reserved rent, is not an adverse possession barring the entry or ejectment of the reversioner.

So, although the reversioner has notice of the cesser of the term and grants a fresh lease to another person, who neglects to enter for more than twenty years.

The holding over for twenty years by lessee for years de-

CASES IN THE KING'S BENCH,

Lord Viscount *Weymouth* granted to one *Martin* a lease of a cottage in the parish of Cheddar for ninety years, determinable on three lives, at a rent of 4*d.*; and in 1784, the *cetteux que vies* in lease of 1732 being all dead, the then Lord *Weymouth* granted to *Richard Gilling* a lease of the same cottage, therein stated to have lately fallen into his lordship's hands, for a like term, determinable on three other lives, at the same rent. At that time *Joseph Wolf*, who was in possession under the lease of 1732, claimed to hold the cottage against *Gilling*, on the ground that one of the three lives in that lease was still in existence, which was not the fact; and he did so hold the same until his death, about twenty-three years ago. On his death his widow, *Ann Wolf*, retained possession of the cottage, and continued therein until her death in 1827. In 1826 she made a will, and told the person who made it for her she had heard the cottage was Mr. *Gilling's*. By the will she devised the cottage to her daughter *Martha*, the wife of *Richard Hooper*, (the pauper,) and her heirs, and appointed *Martha Hooper* her executrix and residuary legatee. The will was duly attested to pass real estate, but no probate thereof was obtained. On the death of *Ann Wolf*, *Richard* and *Martha Hooper*, who had been living with her in the cottage, kept possession of it and lived there for three years, when *Richard Hooper* conveyed it by feoffment and livery to a purchaser in fee, for 8*l.*, it being well worth 40*l.* with good title. No rent has ever been paid by *Joseph Wolf*, or those claiming under him, but *Gilling* and his representatives have paid the rent of 4*d.* to Lord *Weymouth* and his heirs to the present time. One of the *cetteux que vies* in the lease of 1784 is still living.

The question is, whether *Richard Hooper* took such an interest or estate as (coupled with residence) conferred upon him a settlement in Cheddar. If he did, the order of sessions is to be confirmed; if not, the order to be quashed.

Bere, in support of the order of sessions. The paup-

gained a settlement either by virtue of residence on an estate acquired by adverse possession, or by residing on property which had come to his wife as *tenant* to Lord Weymouth by virtue of the will of *Ann Wolf*.

I. As to the adverse possession. There has been possession for fifty years without any acknowledgment of the title being in any one else. The observation made by *Ann Wolf*, at the time of making her will, can scarcely be regarded as an acknowledgment of title; nor can the fact of *Joseph Wolf*'s having claimed to hold on the ground that a life in the lease of 1732 was in existence, operate to prevent the possession from being considered adverse; for in all cases of adverse possession there is something like a false claim of title held out. In *Doe d. Foster v. Scott* (a), copyhold lands were granted to A. for the lives of herself and B., and in reversion to C.:—A. died having devised to B., who entered and kept possession for more than twenty years: On his death C. brought ejectment. It was held, that the action was barred by the Statute of Limitations (b). That case is very similar to this. Here, the possession commenced in 1784. At that time all the *cetteux que vies* were dead. The question is, when did the title of Lord Weymouth accrue? Certainly at the time when, as Lord Weymouth himself states, the first lease expired. At all events the possession since the death of *Joseph Wolf* has been adverse, and that possession has been for more than twenty years. It appears, from the finding of the sessions

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I. First point.
Adverse possession.

(a) 7 Dowl. & Ryl. 190; 4 Barn. & Cressw. 706.

(b) This decision proceeded on the ground that as there can be no general occupant of a copyhold, B. took no estate, and that therefore C.'s right of entry accrued immediately on the death of A.—But the reason why there can be no general occupant of a copyhold, is stated to be, that the freehold is in the lord, who is entitled

to enter upon the death of tenant *pur autre vie*, and hold during the life of *cestui que vie*. *Ven v. Howell*, 1 Roll. Abr. 511; and 6 Vin. Abr. title Copyhold, (P.) pl. 3; *Smartle v. Penhallow*, 2 Lord Raym. 994, 1000, and 1 Salk. 188. In *Doe d. Foster v. Scott*, therefore, C.'s right of entry could not have accrued until the death of B.—But this point was not presented to the Court.

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AXBRIDGE.Second point:
Right to reside.

in favour of the appellants, that in their opinion the possession was adverse.

II. If *Ann Wolf* was in *as tenant*, and not by adverse possession, her interest was transmissible by will, and having been devised by her to her daughter, whom she also appointed her executrix, the daughter took an interest as tenant, and the husband, by virtue of his marital right, gained a settlement. The question upon this part of the argument must be, whether an executor who has not proved the will, has such a right to reside on the estate of the testator as gives him a settlement. In *Rex v. Horsley (a)* it was determined, that a sole next of kin has such an equitable interest in a leasehold tenement of the intestate that he gains a settlement by residing forty days in the same parish after the intestate's death, and before administration granted to him. If an *administrator* has such a right before the granting of letters of administration, à fortiori must an executor have it before the granting of probate; for the principle of *Rex v. Horsley* is, that if a party has the exclusive right to call on the Ecclesiastical Court to clothe him with the legal title, and he resides for forty days in the parish, he gains a settlement. In *Rex v. Stone (b)* it was held, that the executor of a tenant from year to year of an estate under 10*l.* a-year, may gain a settlement by residing on it forty days. In *Rex v. Thruscross (c)* the Court held, that a person who had no *estate* either at law or in equity, but merely a right to reside on the property, might gain a settlement in respect of that right. An executor before probate has such an interest in the estate of testator, that he may receive and pay money and do a variety of other matters.

Rogers and *Moody* contra.

First point.

I. The first possessor of the estate is *Joseph Wolf*. He claimed to hold under the first lease. His possession cannot therefore be considered as adverse, *Doe v. Reed (d)*,

(a) 8 East, 405.

(b) 6 T. R. 295.

(c) *Ante*, iii. 284.

(d) 5 Barnw. & Alders. 232.

and under him alone could the pauper claim. *Ann Wolf*, whose possession might with *more* colour be said to have been adverse, had that possession for sixteen years only. The estate bequeathed by her will would not be a continuance of the estate of her husband. There was no adverse possession until 1826. In *Burton's Compendium to the Law of Real Property (a)*,—when treating on adverse possession,—it is said, “On this subject it may be observed generally, that while there subsists any *contract*, express or implied, between the parties in and out of possession, the possession cannot be adverse.” Applying that doctrine to this case;—the possession of *Joseph Wolf* was not adverse. The lord might have relied on the possession of *Joseph Wolf* in an action against himself as evidence of his own seisin. The acknowledgment by *Wolf* that he held under the lease, would prevent the operation of the Statute of Limitations, *Buller's Nisi Prius (b)*. The first fact from which a tortious ouster can be inferred is the making of the will; and even that is accompanied by the expression that the testatrix had heard that the property belonged to some one else. That declaration would be evidence against parties claiming under her. *Doe v. Pettett (c)*.

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II. *Martha Wolf* could not take the chattel interest, Second point. as no probate had been granted, *Rex v. Okeford Fitzpaine (d)*. *Rex v. Thruscross* was the case of a surrenderee of copyholds, who has a good title against every one but the lord (e). In *Rex v. Stone* no objection as to the want of probate was taken. If reliance is placed on a *chattel* interest, the *probate* must be produced. *Rex v. Horsley* is wholly unlike this case, as *Martha Hooper* is not stated to have been sole next of kin. This branch of

(a) Page 131, pl. 410.

(b) B. N. P. 104.

(c) 5 Barnw. & Alders. 223.

(d) 1 Barn. & Adol. 254.

(e) The customary heir has, before admittance, a valid seisin against all the world, except the

lord; but the surrenderee has no estate as against any one till admittance; he has nothing but a title to admittance as against the lord; as against all the rest of the world he has nothing.

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the argument offered on the other side is based upon the fallacious assumption of the existence of the term.

LORD DENMAN, C. J.—The question is, whether there is any proof of adverse possession. I do not find it expressly stated, nor do I find any facts from which it can be properly inferred. A lease was granted, in 1732, for three lives, to *Richard Martin*. In 1784, it is supposed that the lives are at an end. A new lease is then granted to *Gilling*, and he pays the rent. *Wolf* claims to hold under the first lease, on the ground that one of the *cetteux que vies* is still living; and he does so hold; yet *Gilling* pays the rent during all that time to Lord *Weymouth*. It cannot be said that *Wolf* held under any other claim than this,—that the first lease was in existence. Then his wife held the property. What proof is there that she held it adversely? I see none; and even if she had claimed to hold adversely, there was not sufficient length of time to create a title by adverse possession. There is no case which would warrant us in holding that the circumstances which occurred here amount to an adverse possession; and therefore I think that the Order of Sessions must be quashed.

LITLEDALE, J.—I am of the same opinion. In 1784 Lord *Weymouth* (now the Marquess of *Bath*) granted a lease to *Gilling*. At that time *Joseph Wolf* was in possession. How he came in we do not know; but he claimed to hold the cottage under the first lease, on the ground that one of the *cetteux que vies* was alive. He did not set up any *adverse* claim. He must be presumed to have held under the lease to the time of his death. He left a widow, who continued the possession. It must be presumed that she continued the possession in the same way as *Joseph Wolf* had done before. She devises, expressing that she has some doubts whether it did not belong to *Gilling*, (but do not take any notice of that,) and appointed her daughter

executrix. If she had entered by abatement (a), and made a will of it, that would have been a different thing, but she does not do so. I do not consider that her daughter acquired any right to the fee-simple. She appointed the daughter executrix, but the daughter took no interest in any term, for there was none actually existing except that which was in *Gilling*, for the old lease was clearly gone in 1784. She could only claim in continuation of the estate which her mother had.

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WILLIAMS, J. concurred.

Order quashed.

(a) Query, "by disseisin." Considering the widow as the first deforciant, her wrongful freehold could be acquired only by *disseising* Lord W., unless he died immediately before the forfeiture.

NOY v. REYNOLDS.

INDEBITATUS assumpsit on an attorney's bill. A reference of certain matters connected with the cause had been made to the master by rule of Court. Upon the hearing before the master, affidavits of certain persons were received, and the *vivâ voce* testimony of one *John Druce* (who then refused to make an affidavit), was tendered to but rejected by the master, who, after adjournment, finally made his report upon the matters referred to him,—the report being based upon the affidavits only.

The master, upon a reference to him of certain matters connected with a cause, cannot receive *vivâ voce* evidence, unless specially authorized so to do by the rule of reference, or a judge's order; which order may be made pending the reference.

Pollock, A. G., obtained a rule to shew cause why the matters should not be referred back to the master, and why he should not now receive the written or oral testimony of *John Druce*. His affidavit stated the above facts, and also that *John Druce* had written a letter in which he alleged that he was now ready to make an affidavit in which he would depose to certain facts.

And where upon such a reference the *vivâ voce* evidence of a party who refused to depose by affidavit, was tendered and

was rejected by the master, the Court refused, after the master had made his report, to refer the matter back to him, upon the ground of the party's being then willing to make the affidavits which he had before refused to make.

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*Erle* and *Thomas* now shewed cause. The matter has been finally disposed of by the master upon a due consideration of all the evidence legally brought before him. [Lord *Denman*, C. J. (After consulting with the master.) The master says that it is not the practice, upon references of matters to him, to receive parol evidence, unless the rule of the Court contains an *express* direction to that effect. There is no such direction in this rule.]

*Pollock*, A. G., *contra*, submitted that there was no rule that, where upon references by this Court to the master in relation to a cause, he is required generally to inquire into matters connected with the cause, the general rule of law as to the mode of receiving evidence should not apply.

LORD DENMAN, C. J.—This matter was by an order of this Court referred to the master. By that reference the master is authorized to receive affidavits, but not *vivâ voce* evidence, unless the Court specially empower him to do so. The master has, in this case, received all the affidavits, but has refused to receive parol evidence, in the belief that he had no authority to do so. The party who now applies to the Court might, whilst the matter was before the master, have applied to a judge to give power to the master to receive the oral testimony of this person. I think that the master has done right. Then comes the question, whether, because *Druce* is now ready to make an affidavit, perhaps in accordance with the master's decision, we ought now to refer the matter back to the master? I think not. It ought to be very clearly shewn that justice requires that the matter should be re-considered. The party should have armed himself with the proper powers at the time of the reference. If we were now, because a party who before refused to make an affidavit writes to say that he will now do so, and that such and such is the statement which he will make, to refer the matter back to the master, we should

be doing that which would tend to keep litigation open in a highly improper and disreputable manner.

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LITLEDAL, J.—The master acted in the common course; and there is no reason for referring the matter back to him now.

WILLIAMS, J., concurred.

Rule discharged.

GOSBELL v. ARCHER.

**ASSUMPSIT** on a sale by auction of an estate to the plaintiff, claiming the amount of the deposit paid, the moiety of auction duty paid, interest, and expenses of investigating the title;—with counts for money lent, money paid, money had and received, for interest, and on an account stated. Plea, the general issue. At the trial before Lord *Denman*, C. J., at Guildhall, in February, 1834, the following facts appeared. The defendant being mortgagee and trustee for sale, directed the property in question to be put up for sale by Mr. *Mills*, at the Auction Mart in London. The property was accordingly put up for sale on the 29th of August, 1832, subject to certain printed particulars and conditions of sale, amongst which were the following.


“The highest bidder shall be the purchaser, and a  
sesequently writes to the attorney for the purchaser that they cannot make out a marketable title, and that they advise the purchaser to relinquish his purchase. Held, that the vendor was not bound by the contract.

Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money and money paid by the purchaser to the auctioneer for the purchaser's moiety of the auction duty, may be recovered.

But expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor; nor interest upon the deposit (a).

Whether a signature by *J. N.*, who is authorized to sign a contract as agent for one of the parties to a sale of land, thus, “*Witness J. N.*” will be sufficient to bind the principal where there is no other signature to which these words can be referred as attesting such signature, *quære*.

(a) This action was probably commenced before the 3 & 4 Will. 4, c. 42, came into operation, as otherwise it would have been competent to the jury, under sect. 28, to give interest on the deposit.

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moiety of the auction duty shall then be paid by him:"—  
 "Every purchaser shall immediately pay down a deposit of twenty per cent. into the hands of the auctioneer, and sign an agreement for payment of the remainder to the vendors, on or before the 29th day of September next, at which time the purchases are to be completed, and the respective purchasers are to have possession." "Within twenty-one days of the day of sale the vendors shall, at their own expense, prepare and deliver an abstract of their title to each purchaser, and deduce a good title to the lots sold."

The plaintiff was the highest bidder for lot 2, described as a freehold estate, comprising a dwelling-house, &c., for 400*l.* He paid the deposit of 20*l.* per cent. and a moiety of the auction duty, and receipts were given for the same.

"Auction Mart, 29th Aug. 1832.

"£80

"Received of Mr. *Henry Gosbell*, eighty pounds, in part payment of deposit and half duty on property purchased by him this day, as per agreement. (a)

"For Mr. *Mills, Joseph Newman.*"

"£5: 16*s.* 8*d.*

"Received of Mr. *Henry Gosbell*, five pounds sixteen shillings and eight pence, the deposit due on the purchase of lot 2 at Mr. *Mills's* sale on the 29th August, at the Auction Mart.

"For Mr. *Mills, Joseph Newman.*"

*Newman* was *Mills's* managing clerk, and had authority from him to give such receipts.

The plaintiff also signed the following agreement on the back of the particulars and conditions of sale:—

"Auction Mart, 29th Aug. 1832.

"Lot 2. I have this day become the purchaser of &c. mentioned in the within particular, at 400*l.*, and have paid into the hands of Mr. *John Mills* 80*l.* as deposit and in part payment of the purchase money, and also 5*l.* 16*s.* 8*d.*, being one moiety of the auction duty; and I do agree to pay the

(a) There is nothing to connect this receipt with any particular agreement.

vendors the remaining sum of 320*l.* on the 29th day of September next, and in all respects to fulfil on my part the within conditions. Witness my hand this 29th day of August, 1832.

Witness, *Joseph Newman.* *Henry Gosbell."*

150*l.* was paid by *Mills* to Messrs. *Browne*, solicitors, as agents for the defendant, and as part of the deposit money paid upon the various lots sold.

3d July, 1833. Messrs. *Browne*, as the attorneys for the vendor, wrote to the attorney for the plaintiff, as follows:

*"Archer and others and Gosbell.*

"We had better admit that we cannot make out our title to this property as freehold, so as to render it marketable, and if therefore your client will not take it as it appears on the abstract, the better way will be for him to relinquish his purchase,—and we presume we must pay your charges, which we trust will not be much, and you can then return us our abstract.

"We wish for your client's immediate determination, as we mean finally to settle this long-standing affair."

No sufficient title has ever been made to the property. In addition to the deposit and the moiety of auction duty, the plaintiff claimed 6*l.* 19*s.* 8*d.* for interest thereon, and 30*l.* 11*s.* 2*d.* for expenses incurred by him in investigating the title, and in endeavouring to get the purchase completed.

The plaintiff obtained a verdict for 85*l.* 16*s.* 8*d.*, being 80*l.*, the amount of the deposit, and 5*l.* 16*s.* 8*d.*, the moiety of the auction duty, on the count for money had and received, and the defendant had a verdict upon the other counts. Leave was given to the plaintiff to move the Court to increase the damages by adding the amount of the expenses, viz. 30*l.* 11*s.* 2*d.*, and 6*l.* 19*s.* 8*d.* for interest. A rule nisi accordingly was afterwards granted, with leave to the parties to state a case for the opinion of the Court. The facts were accordingly stated in substance as above, in a special case,

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in which the question submitted was, whether the plaintiff was entitled to recover the 30*l.* 11*s.* 2*d.*, and 6*l.* 19*s.* 8*d.*

*Pollock*, A. G., for the plaintiff. It has never, since the decision of *Wilde v. Fort* (a), been doubted that if a vendor fails to shew a clear title, the vendee has a right to recover the deposit, interest, and expenses incurred in the investigation of the title. The only question, therefore, which can arise is, whether there is in this case a valid contract of sale under the statute of frauds, so as to constitute the relation of vendor and vendee. Undoubtedly the contract which was signed by the plaintiff was not signed by the defendant himself in person: and the question must therefore be, whether the signature by *Joseph Newman* is sufficient, either by reason of a previous authority or of a subsequent recognition, to satisfy the statute. The fact of his having signed in the character of *witness* is not of itself material. In *Sugden's Law of Vendors and Purchasers* (b), it is said "If the party know the contents of the agreement, a subscription *as witness* is sufficient." *Newman*, it cannot be doubted, was fully aware of the contents of the agreement which he had thus signed as a witness. In *Coles v. Trecothick* (c), the clerk to the seller's agent signed thus: "Witness *E. P.*, for Mr. S., agent for the seller," (d) and this was held sufficient under the statute of frauds.

Then was *Newman* clothed with sufficient *authority* to sign for the defendant? *Mills* was undoubtedly agent to the seller, and might have signed for him; and *Newman*, as his clerk, must be taken to have been authorized to act for him in the matter. But supposing that there was no previous authority, (and perhaps it must be admitted that *New-*

(a) 4 Taunt. 334.

(b) Sugd. V. & P. 7th ed. 90, 9th ed. 101; citing *Welford v. Beazely*, 3 Atk. 503, and referring to 9 Ves. 251.

(c) 9 Ves. 234; 1 Smith, 233.

(d) Here the words plainly in-

dicated that *E. P.* was not *attesting* an act done by another, no such act being mentioned, but was expressing his own assent to the contract, as sub-agent for the vendor. *Vide post*, 492 (a).



*man* could not, at the time of signing, have bound the defendant :) there was a subsequent recognition by the defendant, which had reference back to the time of signing, so as to make the contract good under the statute of frauds.

If *A.*, entirely without authority, makes a contract in writing for the purchase of goods by *B.*, and *B.* subsequently ratifies the contract by parol, such ratification renders *A.* an agent sufficiently authorized to make the contract under the statute of frauds; *Maclean v. Dunn* (a), *Soames v. Spencer* (b). It would therefore appear from these two cases, that a ratification by parol is sufficient. Now here, *Newman* signs also receipts for the deposit, which money is paid over to Messrs. *Browne*, the agents of the vendor. The receipt of money goes far beyond any verbal ratification. In addition to this, the contract was ratified by the letter written by Messrs. *Browne*, wherein they admit that there had been a sale to the plaintiff which they were unable to complete, and acknowledge a consequent liability to pay the charges of the plaintiff's attorney.

*Thesiger*, contra. It is admitted by the plaintiff that the signature of a clerk to the auctioneer is not binding, unless there be evidence of the vendor's assent. This was decided by *Coles v. Trecothick* (c). The defendant, on his part, admits that a subsequent assent is equivalent to a previous authority. The question therefore is simply whether there *has* been any subsequent ratification. It has been contended that the ratification was made first by the receipt of money; and, secondly, by the letters of Messrs. *Browne*. The receipt of money was not sufficient for this purpose. The signing of the receipt by the auctioneer's clerk was done in the character of agent of an agent, and the receipt of the money by the defendant, (supposing that to be the

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(a) 4 Bingham 722; 1 Moore & Payne, 761.

(b) 1 Dowl. & Ryland, 32.

(c) *Supra*, 488. And see *Blore v. Sutton*, 3 Meriv. 237.

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fact, which is not clear,) can in no way whatever be regarded as a recognition of authority in the clerk to sign a contract for the defendant.

If the receipt by an agent be sufficient, then in all those cases where the auctioneer receives a deposit the contract would be ratified. The receipt of money is not sufficient:—the ratification must be in writing. Then as to the supposed ratification by letter. It is impossible that this letter, written by an agent, can amount to a recognition by the principal. It is clear that under the statute of frauds you cannot pray in aid any parol evidence, except as to the authority of the agent. In these letters there is nothing to shew what the property was, and parol evidence must therefore be given as to the property which is the subject-matter of the contract. [Lord Denman, C. J. The argument is, that the letters set up the authority of the party who signed the contract.] It is attempted to make the letter of the agent set up the authority of the clerk to the auctioneer, as agent to the vendor. In *Boydell v. Drummond* (a) it was held, that a signature by the defendant in a book, entitled “Shakespeare’s subscribers;—Their signatures,” which did not refer to a printed prospectus which contained the terms of the contract, but which was delivered at the time to the subscribers to the *Boydell* Shakespeare, could not be connected with the prospectus so as to take the case out of the statute of frauds. And the reason was, that such connection could only be established by parol evidence. In this case all that is said is, “We had better admit that we cannot make out our title to this property as freehold.” The letter has no closer reference to the contract than the book of subscribers’ names in *Boydell v. Drummond*.

*Pollock, A.G.*, in reply. If this be not a written contract binding upon the parties, what right has the plaintiff to recover the deposit? If a letter be written containing the terms of a contract, and a letter is returned in answer

(a) 11 East, 142.

assenting to the terms, the two may be connected by parol, and may be given in evidence as forming a contract. So here, the letter and agreement may be connected and given in evidence. In *Boydell v. Drummond* there was no reference to any prospectus. In the letter in this case both parties are named, and it is apparent from it that an abstract has been delivered, and that a purchase had been made. The particulars of sale shew the subject-matter and terms of the contract, and the letter relinquishes that contract. These two documents shew a contract and a recognition of it.

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Lord DENMAN, C. J.—This is an action to recover back the deposit and moiety of auction duty paid at an auction, interest, and expenses of investigating a title, where the defendant had sold an estate to which he could not make out a good title. The plaintiff has a verdict for the deposit and moiety of the auction duty. In order to see whether or not he is entitled to recover the interest and the expenses of investigating the title, an agreement is resorted to which is within the fourth section of the statute of frauds,—which says “that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith (*u*), or some other person thereunto by him lawfully authorized.” It is quite clear

(*a*) Under these words it has been considered sufficient to shew the signature of the party *against* whom the contract is sought to be enforced; so that where a contract between *A.* and *B.* is signed by *A.* only, it is competent to *B.* to repudiate the contract or to compel its execution by *A.* at his election. It seems, however, to

be questionable whether the real meaning of the legislature may not have been to require the signature of *every* person who, before the statute, would have been a party “to be charged,” i. e. “liable to be charged” with the contract. And see *Ferrer v. Owen*, 1 Mann. & Ryl. 222; 7 Barn. & Cressw. 427.

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that in the first instance there was no such agreement, or any memorandum or note thereof, signed by the party, or by any person by that party *previously* thereunto lawfully authorized; but it is contended that there is a subsequent act of a party lawfully authorized, equivalent to the act of the party himself, which recognizes that agreement and ratifies it, and thereby ratifies the agency of the party who signs it. *Maclean v. Dunn* shews that where a party ratifies the contract afterwards, he thereby ratifies the agency of the party making the contract. But then the question is, whether this case can be said to go to that extent?

Here, there is the signature of a person not as party or agent, but as a *witness*. I confess I should wish to have some clear and decisive authority to shew that such a signature could bind the party in any other character than that of witness. Lord *Eldon* says, in *Coles v. Trecothick* (a), (what was not necessary for the decision of the case) that "where a principal or person to be bound signs, what he cannot be, as witness, he cannot be understood to sign otherwise than as principal" (b). I must own that this appears to me to be open to much doubt. A party who was merely required to attest the execution as a witness, might be drawn in to become what he never contemplated, a party to a contract of which he was ignorant. It appears to me this has never been decided in any case, and I should pause before I adopted that dictum. But, supposing it were possible that a party could, by signing as a witness, be bound as a principal, the question is, whether there is that ratification which is necessary to shew that the signing party had authority to sign on behalf of this defendant. With regard to the letter referred to, it is possible that the party writing that letter may have been totally *ignorant* of the *particular*— of any contract, although he might know that there existe—

(a) *Suprà*, 488.

(b) Where a principal signs as "witness," and there is no act of any other person to be attested,

his signature would be altogether nugatory, if it were not intended to testify his assent to the contract. *Vide suprà*, 488 (d).

some contract which could not be carried into effect, and therefore he might justly presume that the charges which had been incurred must be paid by his client. Would it not be letting in all the mischief which the statute of frauds was designed to prevent, if this letter were to be considered as a ratification binding the party to all the particulars of such a contract? This letter is not a ratification of the agreement, but an abandonment of it, and was written merely from a prudential view of the whole matter, without reference to the *terms* of the contract at all.

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LITLEDALE, J.—I am entirely of the same opinion. Although the plaintiff is entitled to recover the deposit, it does not follow that he can recover the expenses of investigating the title, and interest on the money due to him. The two claims stand on different grounds. The plaintiff is entitled to recover the deposit money, because that is money actually paid by the plaintiff to the defendants upon the faith that the contract should be performed, and the receipt of which his agent had acknowledged; and therefore when he disclaims, by his agent, the intention or ability to carry that contract into effect, he holds the money in his hands without consideration, and is bound to return it; and if he do not, it can be recovered as money had and received. But the question, whether the plaintiff is entitled to recover anything for *investigating the title*, and the *interest* of the money due, is a very different one. For this purpose the plaintiff must shew that the defendant entered into a valid *contract*, whereby he had stipulated to make a good title to the plaintiff. This is proposed to be done by putting various things together. The first matters brought forward are two receipts, signed by *Newman*, who was clerk to the auctioneer. The case states that the clerk had authority to give the receipts, that is, because this would be in the ordinary course of business. The auctioneer is the person who receives the deposit money, and his managing clerk would be the person through whose hands the money would go,

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and therefore he is strictly the person to give the receipt. Then the next thing produced is a contract for a purchase, signed by *Gosbell*, in which the amount of the purchase-money is mentioned, and the property is sufficiently ascertained by a reference to the particulars of sale, upon the back of which that contract is written. There is a complete execution, by the plaintiff, of a contract, which in itself is sufficient to satisfy the statute of frauds. Then it is contended that the signature of *Newman* is sufficient to bind the *defendant*; for that being the clerk of the auctioneer, who is one of the agents for the principal, he must be considered as having signed it on account of the principal. I do not find that any such rule is laid down by Lord *Eldon* in *Coles v. Trecothick*. He says, it is true, that where a principal, or party to be bound, signs what he cannot be a witness to, he cannot be understood to sign his name otherwise than as a principal; and therefore if a party who is to be bound signs it as a witness, he must be understood to sign it as a principal, for as a witness he ought not to sign it. Now the signature in that case was thus—"Witness *E. Phillips*, for Mr. *Smith*, agent for the seller." Therefore though the person signing in that case calls himself a witness, it is evident that he could not have signed as such, since he signed for another person; and it was the same thing as if he had signed merely, "*E. Phillips*, for Mr. *Smith*, agent for the seller." That is therefore a different case from this, in which *Newman* does not appear on the face of the instrument to sign in any other character than as a witness. This case does not appear to me to fall within the rule laid down in *Coles v. Trecothick*.

Then it is said that the letter of Messrs. *Browne*, abandoning this purchase, is to be treated as a ratification of what has been done previously. A ratification of what? I do not see what it is to ratify. There is nothing to ratify but *Newman's* receipt of the money. It cannot ratify *Newman's* having signed his name as clerk to the agent; for,

in my opinion, that signature by *Newman* is not a signing as an agent, but as a witness. And besides, the letter (supposing that it were considered as having reference to the property in question) is an *abandonment* of the contract, and could by no means operate as a *ratification* of a contract, which, without a ratification, was imperfect, and not in compliance with the statute of frauds. *Newman's* receipt of the money does not appear to me to amount to anything towards recognizing or admitting that the agreement was binding.

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WILLIAMS, J.—I am of the same opinion. I observed that [Mr. Attorney-General assumed that *Newman*, at the time of signing the instrument, was cognizant of the contents of that document. Neither by internal evidence, nor by any allusion apparent on the face of the document itself, is there anything whatever to shew that there was any such knowledge; and to shew by parol that he had that knowledge, would be one of the mischiefs which the statute was intended to prevent.

With regard to the other point,—as to the receipt for the money by the auctioneer having been signed by that same witness,—that seems to me to come to nothing, because that was an act in the mere ordinary course of business, on a sale by auction at the mart. Therefore the question comes to this, whether or not the letter of *Browne*, the attorney, in which he admits the inability of the vendor to make out a marketable title, and proposes that the plaintiff should relinquish his purchase, implies that every preceding step up to that time had been so taken as to bring the case within the statute of frauds, and to make it a contract which might by law be enforced. It does seem to me that it would be making strained inferences indeed, if we were to say that by that letter it was intended to say that *Newman*, the clerk of the auctioneer, was the agent of the defendant in this case, authorized to sign this agreement, not as a witness, but as an agent on behalf of one of the

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parties; because I perfectly agree that except there be something to shew that the term "witness" was there by mistake, and that really he was agent for a party to the contract, it is impossible to say that this could be a signature by him as a party, or agent of a party.

Verdict for the plaintiff upon the counts for money  
had and received;  
for the defendant upon the other counts.

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CLANCY v. PIGGOTT.

A declaration in assumpsit stated that A. owed the plaintiff 5*l.*, and plaintiff had a lien on goods of A.; that defendant, in consideration that plaintiff would abandon such lien, promised to see him paid the said 5*l.* within three months.

Averment, that the plaintiff abandoned his lien.

Plea: that the promise was a special promise to answer for the debt and de-

**ASSUMPSIT.** The declaration stated that one *Moore* was indebted to the plaintiff in 5*l.*, and that the plaintiff had in his possession goods and chattels of *Moore* of the value of 20*l.*, holding the same as security, and having a lien thereon for the payment of the said debt; that in consideration of the premises, and that the plaintiff, at the request of the defendant, would relinquish and give up the possession and custody of the goods and chattels so held as aforesaid to *Moore*, and would abandon and forego his lien thereon, the defendant undertook and promised the plaintiff to see him paid the said sum of 5*l.* within three months from that time. The declaration then averred, that the plaintiff, confiding in the promise of the defendant, gave up the possession of the goods to *Moore*, and abandoned his lien thereon, and alleged a breach by the defendant of his promise and undertaking, and that the 5*l.* still remained due and unpaid.

Pleas: first, the general issue; secondly, that the st

but that there was no agreement in writing stating the consideration in a certain memorandum in the following for three months from date hereof the st



posed promise and undertaking in the declaration mentioned, *was a special promise to answer for the debt and default of another person*, to wit, *Moore*, and that no agreement in respect of or relating to the supposed promise or cause of action in the declaration mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, *was in writing and signed by the defendant*, or by any other person by him thereunto lawfully authorized, according to the form of the statute in such case made and provided; and further, that the supposed undertaking and promise in the declaration mentioned was and is contained in a certain memorandum in writing, signed by the defendant, and which was and is as follows, (that is to say,)

“ *Mr. Clancy,*

March 6, 1832.

“ Sir, I hereby agree to see you paid within three months from date hereof, the amount of *5l.*, due to you on account of *Mr. George Moore*, junior, of *Sheffield*.

“ *John W. Piggott.*”

The plea concluded with a verification, &c.

The plaintiff demurred to the second plea, and assigned the following causes of demurrer:—that the plea, in stating that the promise in the declaration mentioned is contained in the memorandum in that plea set forth, is argumentative, inasmuch as a sufficient consideration for the promise is set forth in the declaration, but no consideration or promise whatever is stated in the memorandum in the second plea mentioned, and that the plea, instead of such a statement, should have denied positively the making of the promise and undertaking in the said first count mentioned,—and also that the plea neither confesses and avoids, nor traverses or denies the matters in the declaration mentioned, and for that there is *no occasion* that such promise and undertaking as that in the declaration mentioned, *should be in writing*, and signed by the defendant, or by any person by him thereunto lawfully authorized according to the said statute

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or otherwise, and that it is not a promise or undertaking to answer for the debt and default of another person.

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*Austin*, in support of the demurrer. The most material question raised by the plea is, whether the promise mentioned in the declaration is a promise to answer for the debt and default of another within the statute of frauds,—for such it is by the plea alleged to be. This distinction pervades all the cases upon the subject,—that where the new promise is merely *collateral* to and in affirmance of the old promise, it is within the statute, and should be in writing, but not where it is made *upon a new consideration*. All the cases upon the subject are collected in a note to 1 *Evans's Statutes*, 212. In *Buckmyr v. Darnall*(a) the case was, that the defendant, in consideration that the plaintiff at his request would lend and deliver (locaret et deliberaret) to one *Joseph English*, a gelding of the plaintiff's, for the purpose of riding to Reading, undertook and promised the plaintiff that he and *English* would re-deliver the horse. After much argument, it was determined that this promise was within the statute, for that inasmuch as *English* might have been charged in detinue on the bailment, which was the consideration for the promise of the defendant, that promise was merely *collateral*. In *Buller's N. P.* 281, it is questioned, whether the fact of the undertaking's being collateral or not is the true criterion; and it is stated that a promise to answer for the debt of another, though upon a *new consideration*, is within the statute; but all the cases appear to proceed upon the distinction which has been adverted to. In *Jones v. Cooper* (b), *Matson v. Wharam*(c), and other cases, in which the courts have held the promises to be within the statute, there were mere naked promises to pay the debts of third parties by persons upon whom no duty was previously thrown. Here,

(a) 3 Lord Raym. 1085.

(c) 2 T. R. 80.

(b) Cowper, 227.

there is altogether a *new* consideration, viz. the abandonment by the plaintiff of the lien which he then had, and cannot now recover, upon the goods of *Moore*. In *Williams v. Leper* (a) it was held, that a promise to the landlord of a third party, to pay the rent of such third party, if the landlord would desist from distreining, need not be in writing. That case is less strong than the present; for here, the consideration was the abandoning a lien upon goods already in the possession of the plaintiff; whereas there, the consideration was only the *abstaining from taking possession*. An auctioneer employed to sell goods on premises in respect of which rent was in arrear, who, upon the landlord's applying for his rent, verbally promised to pay, was held to be liable upon that promise; *Bampton v. Paulin* (b), *Edwards v. Kelly* (c). The landlord's right of distress upon the goods of his tenant, is quite analogous to the lien possessed by the plaintiff in this case. Where a tradesman having goods of his creditor in his possession, upon which he has a lien, parts with those goods upon the promise of a third party to pay the demand, such promise was held not to be within the statute of frauds; *Houlditch v. Milne* (d). That case is not distinguishable from the principal case, either in the facts or in principle; and the judgment of Lord *Eldon* is strictly applicable here. *Castling v. Aubert* (e), in which all the former cases are brought to the notice of the Court, is to the same effect. *Barrell v. Trussell* (f) and *Thomas v. Williams* (g), may also be referred to as illustrating the distinction between a *collateral* undertaking and a promise founded on a *new* consideration. In Mr. Serjt. *Williams's* note to *Forth v. Stanton* (h), the cases are for the most part cited, and it is said, "But where the promise is founded upon some *new* consideration, suffi-

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(a) 3 Barr. 1886.

(b) 4 Bingh. 264; 12 B. Moore, 497.

(c) 6 Maule & Selw. 204.

(d) 3 Esp. N. P. C. 86.

(e) 2 East, 325.

(f) 4 Taunt. 117.

(g) 10 Barn. & Cressw. 664.

(h) 1 Wms. Saund. 211 a.

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cient in law to support it, and is not merely for the debt of another, such an undertaking, though in effect it be to answer for another person, is considered as an original promise, and not within the statute."

*Blackburne*, contra. The question is not, as has been assumed by the argument for the plaintiff, whether the declaration *unanswered* is sufficient; but whether the facts stated in the *plea*, and which are admitted by the demurrer, constitute an answer to the action. If this action had been brought before the promulgation of the new rules, the general issue would have been pleaded; and if at the trial the instrument set out in the plea had been produced, the want of consideration apparent upon that instrument would have been an answer to the action. Under Reg. Gen. H. T. 4 *Will.* 4, Assumpsit, 3, it is ordered that, "In every species of assumpsit, all matters of confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." Under this rule it was necessary, that the facts intended to be relied on for the defence should be set out in the plea. They have been so set out, and the truth of the facts has been admitted by the demurrer. The only question therefore is, whether it is a sufficient answer to shew that the undertaking of the defendant was contained in a written memorandum, such as is set out in the plea. Now it is requisite, under the statute of frauds, not only that the promise to answer for the debt or default of another should be *in writing*, but also that the written promise should *state a valid consideration*; and where upon the face of such an instrument, a defective consideration, or none at all is stated, evidence cannot be resorted to for the purpose of supplying the defect. *Saunders v. Wakefield*(a) appears to be quite conclusive of this case.

(a) 4 Barn. & Alders. 595.

*Austin*, in reply. It seems to be admitted that the argument upon the declaration is good, but it is said that an agreement is set out in the plea, which is admitted to be the real agreement between the parties, and which is invalid. The demurrer does perhaps admit that there was such an agreement, but it does not follow that there was not another and a different one. [Lord *Denman*, C. J. The plea states that *the* agreement was in that form.] Then it must be taken as if the question had arisen at *nisi prius*. Evidence may be given to prove additional matter *not inconsistent with* the facts stated in the written undertaking. *Saunders v. Wakefield* does not apply; for in that case the agreement was clearly within the statute, whereas here it is denied that such is the case. In 3 *Stark. Ev.* 1049 (a), it is laid down, "that previous or cotemporary declarations are not admissible to vary the terms of a written agreement; where, however, the nature of the subject-matter does not require the agreement to be in writing, although a presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the *whole* of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence, that what was so written was intended as a mere memorandum of a part or branch only of a more general agreement." And this distinction is recognized by the Lord Chancellor in *Peacock v. Monk* (a). [*Littledale*, J. Here the promise is *prima facie* within the statute.] The defendant ought to have averred in his plea, that there was no other consideration. [Lord *Denman*, C. J. Supposing the evidence to be admissible, ought you not to have replied it?] This question, it is said, ought to be considered as if the matter stated in the plea had been shewn, according to former practice, at the trial under the general issue. Now, at the trial, the plaintiff might have shewn a con-

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(a) First edition.

(b) 1 Vesey, sen. 128.

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sideration not inconsistent with the written instrument. From *Mildmay's* case (a), and *Vernon's* case (b), it appears that a party may aver an *additional* consideration, not inconsistent with the statement of consideration, even in a *deed*. If additional consideration may be proved, à fortiori must evidence be admissible to shew consideration, where *none* is stated in the deed or other instrument.

LORD DENMAN, C. J.—I am of opinion that this case cannot be distinguished from that of *Saunders v. Wakefield*. Though there the agreement was set out by the *plaintiff* in his *replication* in order to shew that a written agreement was given to satisfy the statute of frauds, yet that does not appear to me to bind the plaintiff more than his adoption in this case, (by the demurrer,) of the statement in the defendant's plea. The plaintiff by his demurrer admits, as it appears to me, that the contract which the defendant describes in his plea, and which he states to have been made in writing in the form there set out, is the real contract between the parties.

It is said that parol evidence may be received; but it is admitted that it cannot be received if the statute requires a written agreement. Now, *primâ facie*, the contract contained in this writing is one for which the statute does require a written agreement, and the plaintiff has not by any kind of statement, (and probably he could not be permitted to do so,) made any difference in the terms of that agreement. It therefore appears upon the record, that this was the agreement between the parties: and as there is no consideration stated, it falls to the ground.

LITLEDALE, J.—Every thing that is stated in these pleadings is also stated in *Saunders v. Wakefield*. The only difference is, that there the *plea* stated that the defend-

(a) 1 Co. Rep. 175.

(b) Fifth Resolution, 4 Co. Rep. 3 a.

ant's undertaking was a promise to answer for the debt and default of another person, and that there was no agreement in writing stating the consideration for the promise, signed by the defendant, according to the statute, and the *replication* set out what the agreement really was; whereas *here* the whole matter stated in the plea and replication in *Saunders v. Wakefield*, is set out in the *plea* alone, and *admitted* by the plaintiff's demurrer. It is clear to me, even upon the declaration in this case, that this was a promise to pay the debt of another person, notwithstanding all that is said about the lien on the goods; but upon the construction of the statute of frauds, it has been held that if there be a new consideration moving from the plaintiff to the defendant, though it is a promise to pay the debt of another person, it need not be in writing. Upon the face of this declaration there is a new consideration, which *primâ facie* would appear to make a promise in writing unnecessary. But the defendant in the beginning of his plea avers that the promise mentioned in the declaration is a special promise to answer for the debt and default of another person, to wit, *Moore*, which is no more than what is stated in the declaration itself; and then it goes on to state, that there was no agreement relating to the promise, wherein the consideration for the promise is stated, signed by the defendant, according to the statute of frauds. And upon the construction of that statute it has been held, that not only the *promise* should be in writing, but also that the *consideration* for the promise should appear upon the face of the written instrument in some way or other, either in direct terms, or in such a way that you can fairly infer what the consideration was. If the plea had stated nothing more, that would appear to be a sufficient answer, and it would have lain upon the plaintiff to have shewn what the agreement really was. But the defendant goes on to allege that the promise was and is contained in a certain memorandum in writing, which was and is as follows, that is to

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say;—and then the agreement is set out. Now Mr. *Austin* objects that the plea should have averred that this was the *only* agreement. But I think the plea sufficiently *identifies* the agreement set out with the promise on which the action is brought. The plaintiff, by demurring, admits the agreement to be as set out in the declaration. The agreement, as set out, does not contain any statement of a consideration, but is a naked promise to pay, and that being the case, it appears to me that the plea is a sufficient answer to the action.

WILLIAMS, J.—I am entirely of the same opinion. The plea in this case is precisely in the same form as that in *Saunders v. Wakefield*, which was held by the Court to be a good and sufficient plea, with the addition that the plea on the present occasion sets out what was the actual memorandum in writing which was signed by the defendant. And if the plea would have been good, as *Saunders v. Wakefield* shews, if it had stopped at the allegation of there being no agreement relating to the promise mentioned in the declaration, in which the consideration was stated in writing, signed by the defendant, according to the meaning of the statute, I am at a loss to discover how the introduction of the very precise memorandum, upon which the plea is founded, can vitiate the plea. It appears to me that it most assuredly does not, and that the undertaking is clearly within the meaning of the statute of frauds. I think that *Saunders v. Wakefield* goes the length of disposing of the question.

Judgment for the defendant.





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## BIRD v. HIGGINSON.

**ASSUMPSIT.** The first count of the declaration stated, that on the 8th of August, 1833, by a certain agreement made between the plaintiff and the defendant, the plaintiff agreed to let, and the defendant agreed to take, a messuage situate at Dinas Mowddy, in the parish of Mallwyd, Merionethshire, except the apartments then occupied by the game-keeper of the manor thereafter mentioned, together with the use of the furniture then being in the said messuage, *and full and free and exclusive licence and leave, to and for the defendant and his friends, game-keepers, and servants, to hunt, hawk, course, shoot, and sport, in, over, and upon, all that the manor of Dinas Mowddy, situate in the parishes of Mallwyd and Llanymowddy, and to fish in the ponds and waters thereof, at all reasonable times during the term thereafter mentioned; to hold the said messuage, right, liberties and premises thereby agreed to be let, to the defendant, his executors &c., until the 1st February then next, at the rent of 200l.* And it was thereby further agreed, that the defendant should have the benefit of the services and attendance of the game-keeper for the time being of the manor, and of the servants in the house, without contributing towards the payment of their wages, and that the expense of preserving the game and warning off all trespassers should be borne by the lord of the manor. And the defendant thereby agreed to pay the rent of 200l., and to quit and deliver up possession of the messuage to the plaintiff, his heirs or assigns, immediately after the 1st February. Mutual promises. Averment, that the plaintiff then let to the defendant the said messuage, right, liberties,

A demise in writing, but not under seal, of a messuage, and full and free and exclusive licence and leave for the lessee, his friends, game-keepers, &c. to hunt, hawk, course, shoot, and sport, in, over, and upon a manor of the lessor, and to fish in the ponds and waters thereof, from August to February following, at an entire rent, is altogether void.

*Seemle*, that where a count in assumpsit to recover a rent reserved by parol demise, by the plaintiff to the defendant, of an incorporeal hereditament, states that the defendant actually occupied under such demise, the plaintiff may recover for the use and occupation.

But where a count upon a parol demise of a messuage and the right to hunt &c. over a manor, stated merely that the defendant *entered and became and was possessed of* the messuage, right, liberties, and premises so to him granted as aforesaid: Held, that the plaintiff could not recover for the use and occupation.

Held, that the statement of *actionem non* and the prayer of judgment are dispensed with by the ninth of the Rules of Pleading, (H. T. 4 W. 4,) in a plea which is pleaded to the whole of *one* of several counts. *Vide post*, 508 (a).

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and premises so agreed to be let as aforesaid, from the day and year first aforesaid until the 1st day of February, 1834, and the defendant *then entered into and upon the same, and became and was possessed thereof* for the term so to him thereof agreed to be granted as aforesaid. Breach: non-payment of the 200*l*.

The third plea to the above count was as follows:—And for a further plea in this behalf as to the first count of the said declaration, the defendant says, that the said manor was a manor containing divers, to wit, 32,000 acres, and the said messuage in the agreement mentioned was a small house taken by the defendant, and intended to be occupied by him solely for the more convenient enjoyment of the exclusive right or liberty in the agreement mentioned to be demised or granted to him in and over the manor; and that the said agreement was an agreement under the respective hands of the plaintiff and of the defendant in that behalf, and was not nor is sealed with the seal either of the plaintiff or of the defendant, or of any persons by them or either of them thereunto lawfully authorized; wherefore the said agreement was and is void in law, and this the defendant is ready to verify, &c.

The plaintiff demurred to this plea, and assigned as causes of demurrer,—that although the plea is pleaded to the first count only of the declaration, it does not contain any allegation of *actionem non*, or any prayer of judgment;—and also that it amounts to the general issue;—and that it is argumentative in that it indirectly denies that any promise was made by the defendant as in the first count mentioned;—and also that the plea is wrongly concluded, because although it denies that any valid promise was made, yet it does not conclude to the country, but with a verification.

Joinder in demurrer.

*F. Kelly* in support of the demurrer. It is clear that the plea is bad in form, by reason of the omission of the allegation of *actionem non* and of the prayer of judgment, unless

the ninth of the new Rules of Pleading (a) applies. That rule dispenses with the necessity of using these forms only "in a plea or subsequent pleading intended to be pleaded *in bar of the whole action* generally." This plea is pleaded to *one count* only, and is not therefore within the rule. Further, the plea should have concluded to the country and not with a verification, for no new matter is in substance alleged (b). The substance of the plea is, that the instrument is not under seal; which already sufficiently appears upon the count, which, if the fact had been otherwise, would not have been in *assumpsit*. Again, the plea amounts to the *general issue*, for if the plea be good the promise is *void*. The principal question is, however, as to the validity of this parol instrument. It cannot be said that any incorporeal hereditament was intended to be passed. The declaration is on a special agreement, by which the plaintiff demises a house together with a mere *licence* to hunt, &c. over the plaintiff's manor; and the defendant, in consideration of such demise and licence, agrees to pay a sum of money. There appears to be no reason why a *licence* to hunt, &c. should not be given by parol. *The Duke of Somerset v. Fogwell* (c) and *Gardiner v. Williamson* (d) will be relied on contra. In the former of those cases it was held, that a

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(a) *Ante*, vol. iii. 5.

(b) Wherever *new* matter is alleged, the plea should conclude to the *court* and not to the *country*. If the *new* matter is contained in an *affirmative* allegation, the plea should also conclude with a *verification*; but if the new matter is in the *negative*, it is informal to "verify" it, i. e. to offer to prove it in case its truth shall be denied by the adverse party. Vide Co. Litt. 303 a, *ante*, 231.

Where a plea concludes with a verification, and the defence goes to the *whole* cause of action, it is *not necessary*, since the above rule,

to add a prayer of judgment; but where the verification is omitted, as in pleas containing new *negative* matters only (which ought not to be verified) or in *avowries* (which do not require verification, Co. Litt. 303 a), the omission of the prayer of judgment might create some confusion,—especially where another plea followed, which, under such circumstances, it would be difficult to distinguish from that which preceded it.

(c) 8 Dowl. & Ry. 747; 5 Barn. & Cress. 875; *post*, 509.

(d) 2 Barn. & Adol. 336.

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*term of years* in a fishery cannot be created without deed; and, undoubtedly, as incorporeal hereditaments lie in *grant*, an interest therein can pass only by *deed*. Here, however, a mere *licence* to hunt, &c. is professed to be given. In *Gardiner v. Williamson*, the facts were—that *A.*, by an instrument not under seal, agreed to let on lease to *B.* for three years, at an entire rent, the rectory of *L.*, and the tithes arising from the lands in *L.*, and also a messuage used for collecting the tithes: *A.* having distrained for arrears of rent, and trespass being brought by *B.*, the Court held that the distress was unlawful. No doubt a *lease* of tithes, or other incorporeal hereditaments, cannot be granted otherwise than by deed; but here the observation recurs, that in *this* case a licence only and not a lease is intended to be given. These two cases have, therefore, no application here.

Sir John Campbell, *contra*. The allegation of *actionem non* and the prayer of judgment were well omitted. The ninth Rule of Pleading is framed upon the supposition that the declaration contained only one count. Where the plea is to a whole count the allegation of *actionem non* is mere superfluity (*a*). Where the plea is to a part of the

(*a*) When the defendant presented himself to answer the declaration, the plaintiff and the Court being as yet uninformed whether he meant to confess the action, to demur to the declaration, to plead in abatement, or to plead in bar, the defendant, by the words *actionem non*, shewed that what he was about to state was offered in bar of the action. The *general actionem non* would be incorrect when it introduced matter which was pleaded to *one* of several counts or to *part* only of the action, as it could not be said that the plaintiff ought to be barred of his whole action, *because* some divisible por-

tion of it was ill founded. Where the plea went to *part* of the action only, the introductory form was *actionem inde non*; or after the pleadings were in English, "ought not to have or maintain his action *thereof* against him." As the "*inde*" could do no harm, it was commonly used by pleaders, even where the plea went to the whole action, and where, therefore, the "*inde*" or "*thereof*" had no antecedent to which it could be referred. The intention of the framers of the rule was probably to dispense with the *general actionem non*, but to preserve the *actionem inde non*, which appears to be in some measure ne-

count, it is necessary by this allegation to point out the particular part to which the plea applies.

The objection that the plea should have concluded to the country, not with a verification, is clearly not tenable.

Then it is said that the plea amounts to the general issue. This defence might formerly have been given in evidence under the general issue, but it does not follow that it might not have been pleaded specially (*a*). Under the new rules, however, it is clear that the defence could *not* have been given in evidence under the general issue; for by the rule, ASSUMPSIT 3, it is ordered, that "in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge but those which shew the transaction to be either *void* or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

Then is the interest intended to be conveyed by this instrument such as is capable of passing by parol or not? It clearly purports to grant an interest in incorporeal hereditaments *in gross*, and not as *appurtenant* to the house. The plaintiff professes to let to the defendant a right to *fish* in the ponds and waters of the manor; and *The Duke of Somerset v. Fogwell* (*b*) is an express authority to show that this can pass only by *deed*. *Hewlins v. Shippam* (*c*) shows that even an *easement* over the land of another cannot pass except by *deed*. It most clearly cannot be said that the whole rent was reserved in respect of the messuage in this case, either in point of fact or in contemplation of law; and the rent being partly reserved in respect of the right to hunt, &c. of which there was no valid grant, the whole reservation is bad; *Doubitofte v. Curteene* (*d*), *Dalston v.*

cessary in order to make the defence intelligible. It is true that the statement at the commencement of the plea, that it is pleaded to part of the demand only, is *nearly* equivalent; but this is as much so when applied to *part* of a count as to *one* of several counts.

(*a*) Vide *Maggs v. Ames*, 4 Bingh. 470; 1 Moore & Payne, 294; *ante*, 116.

(*b*) 8 Dowl. & Ryl. 747; 5 Barn. & Cressw. 875; *suprà*, 507.

(*c*) 7 Dowl. & Ryl. 783; 5 Barn. & Cressw. 221.

(*d*) Cro. Jac. 453.

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*Reeve*(a), *Doe d. Griffiths v. Lloyd* (b), *Gardiner v. Williamson* (c). The last of these cases is on all fours with the case now under consideration. [*Littledale, J.* There was a case (d) in which a rent was reserved out of two things—out of one of which rent could be reserved, and out of the other of which it could not be reserved; and the Court held, that the whole rent might be taken out of the one from which it could legally be taken (e).] There the demise was under seal. It is undoubted law, that where there is a valid demise of corporeal and incorporeal hereditaments at an entire rent, the rent is supposed to *issue* out of the corporeal hereditament alone. The plaintiff cannot recover under this count in respect of any use and occupation of the messuage, or in respect of any game, fish, &c. taken by him. The count *on the contract* must stand or fall as the *contract* is held to be valid or otherwise. The declaration itself is bad. If this interest could only be granted by deed, the declaration ought to have alleged that it was granted by deed under seal, and the action should have been in *covenant*.

*F. Kelly*, in reply, (after recapitulating his former argument as to the formal objections to the plea). It is a strong position that where a man has occupied for a length of time a house and premises, with liberty of hunting, &c. under an agreement by which rent is reserved, he is not compellable to pay the rent, because the agreement was not under seal. [*Williams, J.* You have your remedy by an action for use and occupation.] The declaration in this case originally contained a count for use and occupation, which was struck out by the order of a judge, as being a second count in respect of the same cause of action. It is manifest, therefore, that the plaintiff ought to be allowed to recover for use and occupation under this count. It appears upon this

(a) 1 Lord Raym. 77.

(b) 3 Esp. N. P. C. 78.

(c) *Suprà*, 507.

(d) *Semble, Doubtloffe v. Cur-*

*teene, suprà*, 509.

(e) Vide 2 Wms. Saund. 303,

*The Dean and Chapter of Windsor v. Gover.*

count that the defendant had the occupation during the whole of the time for which the plaintiff agreed to let him have it. All the facts which it would be necessary for the plaintiff to prove under a count for use and occupation appear upon this count. Why then may not the plaintiff recover as upon a common indebitatus count? [*Littledale, J.* Is there any case in which it has been held that you might reject so much matter from a special count like this, as to reduce it to a common count?] In *Chitty on Pleading*, forms are given of indebitatus counts adapted to recover for use and occupation, which had been enjoyed under a contract for rights of fishery, &c. The cases cited, to show that in this case a deed was required, do not apply. If the demise be considered void as to part of the subject-matter, there may be an apportionment of the rent, and the plaintiff may recover a part of the rent in respect of that of which there is a valid demise. Argument of *Saunders* in *The Dean and Chapter of Windsor v. Gover* (a), recognized by *Parke, J.* in *Gardiner v. Williamson* (b). The licence given by this agreement would clearly operate to excuse that which would otherwise be a trespass. Therefore there was some consideration, at all events, for the defendant's promise.

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At a subsequent day in the term the judgment of the Court was delivered by—

Lord DENMAN, C. J. who, after stating the pleadings, proceeded as follows:—We think that the defect in omitting the allegation of actionem non and the prayer of judgment is expressly cured by the ninth of the new rules. The expression used in that rule of “the whole action generally,” meant the whole cause appearing in the count to which the plea is pleaded (c).

The other objection is of a more general nature. It is,—

(a) 2 Wms.Saund. 303. (b) *Suprà*, 507, 510. (c) *Vide ante*, 457 (a).

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that the agreement is for the demise of an incorporeal hereditament, and ought therefore to have been under seal—and we are clearly of that opinion. We wished, however, for some time to consider whether the plaintiff might not be entitled to recover on this count for the actual enjoyment of the thing demised. On examining it more accurately we find that this count is not so framed; for it only alleges that the defendant entered and became possessed of the term, which he might do without a single hour's occupation of the premises.

There are other objections; but this is decisive.

Judgment for the defendant.

PRUDHOMME v. FRASER.

In a count in a declaration for a libel, various parts of one continuous article, in which the plaintiff is not mentioned by name, are applied to him by innuendoes. Under the general issue pleaded, the jury negatived the greater part of the innuendoes. The plaintiff is entitled to costs in respect of that part of the libel only which is found to apply to him.

CASE for a libel. The declaration contained only one count, which, after stating in the inducement that the plaintiff was a household servant and cook to Earl Grey, and alleging that the libel was published of and concerning the plaintiff as such household servant and cook, set out nearly the whole of a long article published in *Fraser's Magazine*, entitled "Household Servants—By the author of *Old Bailey Experience*;" in which the mal-practices of various kinds of household servants, male and female, were mentioned and commented upon. Whenever in the course of the article statements were made as to servants in general, there were innuendoes stating that they applied to the plaintiff among others. The count extended over twenty-seven brief sheets closely copied. The defendant having pleaded the general issue, the cause came on for trial before Lord Denman, C.J. at the sittings for Middlesex after last term, when a verdict was found for the plaintiff. The jury found specially, that a certain small portion only of the article was intended to apply to the plaintiff. At the commencement of this term,



*Erle* moved for a rule to shew cause why the verdict should not be entered for the defendant generally, or why the verdict for the plaintiff should not be confined to that part of the declaration which applied to the plaintiff, and a verdict be entered for the defendant as to the remainder. This application is made with a view to the *costs* only. [Lord *Denman*, C.J. There is no doubt, I think, of your being entitled to have the verdict confined to those parts of the count which applied to the defendant. But this will probably require a very particular examination of the record.] The plaintiff has failed to support the greater part of the innuendoes by which he has alleged the various statements in the supposed libel to be applicable to himself. In *Sellers v. Till* (a), which was Case for defamation, the declaration alleged that the plaintiff was treasurer to, and collector for, certain persons, of certain tolls, and that the defendant spoke the words of and concerning the plaintiff as such *treasurer* and *collector* aforesaid; and after setting out the words, there was an innuendo applying the words to the plaintiff's character as such collector and treasurer. At the trial the plaintiff proved that he was *treasurer*, but failed to make out his appointment as *collector*, and he was in consequence nonsuited. Upon motion for a new trial, on the ground that the words were actionable if spoken of the plaintiff in his character of *treasurer*, and that consequently it was unnecessary to prove that part of the inducement which stated that he was also *collector*, (for which *May v. Brown* (b), and *Lewis v. Walter* (c) were cited,) the Court answered, that the case was distinguishable from those cited, because there was in the count an *innuendo* expressly applying the words to the plaintiff in his character of *collector*; whereas in the cases cited the meaning of the words was not limited by


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(a) 4 Barn. & Cress. 655; S. C. per nomen *Sellers v. Killew*, 7 Dowl. & Ryl. 121.

(b) 4 Dowl. & Ryl. 670; 3 Barn.

& Cress. 113.

(c) 4 Dowl. & Ryl. 810; 3 Barn. & Cress. 138.

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the insertion of any such innuendo; and that "the plaintiff was bound to prove that the words were applicable to him in the manner that he himself pointed out, and for want of such proof was properly nonsuited." In *Smith v. Carey* (a), which was an action for slander of the plaintiff in his trade, the words were by an *innuendo* explained to be an imputation of *felony and robbery*. At the trial it appeared that the defendant meant to impute *fraud* only. Lord *Ellenborough* thought the words actionable in themselves, but that the plaintiff was bound to shew that the words were spoken in the sense which he had ascribed to them by the *innuendo*; and he therefore directed the jury to find for the defendant, if they were satisfied that he intended to impute *fraud* only. *Flower v. Pedley* (b). The plaintiff is bound to prove all the material allegations in his declaration, and where he puts *unnecessary* averments upon the record, he *makes them material*, *Heriot v. Stuart* (c). This declaration contains in one count a great number of supposed causes of action; and it is submitted that the plea of not guilty raises separate issues upon all the different causes of action, and that therefore the defendant is entitled to have the verdict entered for himself upon those parts which are found not to apply to him, in the same manner as would have been done if he had pleaded separately to each supposed cause of action. This point was somewhat considered in *Cox v. Thomason* (d), in which the Court held, that the general issue pleaded without restriction to the whole of a declaration containing several counts, raises distinct *issues* upon each count; and that therefore the plaintiff is, under the rule of Hil. 1 Will. 4, s. 74, entitled to the costs in respect of such counts as are found for him. The plaintiff has chosen to say that the whole of the declaration was relevant, and, by so doing, has prevented the de-

(a) 3 Campb. 461.

(b) 2 Esp. N. P. C. 491.

(c) 1 Esp. N. P. C. 437.

(d) 2 Crompt. & Jerv. 498; 2 Tyrwh. 411; 1 Dowl. P. C. 572.

pendant from making any effectual application to have any parts of it struck out.

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*Cur. adv. vult.*

On a subsequent day in this term,

Lord DENMAN, C. J. said—We are of opinion that the plaintiff is entitled to the costs only of such parts of the declaration as were found by the jury to apply to him. When the master comes to tax the costs, he will attend to this declaration of our opinion, and therefore no rule is necessary.

Rule refused.

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HOLL and BEVAN v. HADLEY and BROWN, Executrix and Executor of NATHANIEL HADLEY, deceased.

**ASSUMPSIT** upon two several guarantees for 1000*l.* and 300*l.* Plea: non assumpsit, and actio non accrevit infra sex annos. Verdict for the plaintiffs, damages 1300*l.*, subject to the opinion of this Court on the following case:—


The plaintiffs, during the transactions hereinafter mentioned, were coal merchants carrying on trade in London.

Previously to March, 1818, the testator's son, *Nathaniel*,

*A.*, in consideration of *B.*'s extending to *C.* a period of two years and upwards for the liquidation of his debt, agrees to reserve to *B.* all right and claim which *B.* may now have against him, *A.*, by virtue of the security previously entered into on *C.*'s behalf, and to be bound by it, if, at the expiration of such period, *B.*'s demand shall not have been fully discharged. Held, that *A.*'s liability attached upon default made by *C.* after the expiration of two years and a few days; that *B.*'s right of action then accrued; and that, therefore, the statute of limitations then began to run.

*A.* guarantees to *B.* the debt of *C.* upon condition, "that no application shall be made to *A.*, on *B.*'s part, for the amount guaranteed, or any portion thereof, but on the failure of *B.*'s utmost efforts and legal proceedings to obtain the same from *C.*." *C.* remains in England two years, then goes abroad insolvent, not having paid the debt to *B.* No proceedings are taken against him until four years after the guarantee given, when process is issued, and continued on the roll, *C.* remaining abroad until more than six years after the guarantee given;—the guarantee is discharged by the laches of *B.*

*A.*, in consideration of *B.*'s supplying *C.* with goods, guarantees to *B.* the payment of the price. *B.* having supplied *C.* with goods, and *C.* having neglected to pay the

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then a dealer in coals, had been supplied by the plaintiffs with coals upon short credit.

23 March, 1818, the testator signed the following guarantee :—

“ Gentlemen :—My son having stated to me that he has opened an account with you, and that you are not willing to supply him to the extent that he will require without having security ; and, in consideration of your agreeing to give him credit for any sum not exceeding 1500*l.*, for the purpose of enabling him to carry on his business, I do hereby hold myself liable to you for a sum not exceeding 1000*l.*, under this my guarantee for him to that amount ; but upon the express condition that no application shall be made to me on your part for the same sum of 1000*l.*, or any portion thereof, but on the failure of your utmost efforts and legal proceedings to obtain the same from him.

(Signed) “ *Nathaniel Hadley.*”

The plaintiffs, on the faith of this guarantee, delivered coals to *N. Hadley, jun.* upon credit, to the amount of 1554*l.*, and, on 28th March, 1819, drew a bill on him for 1500*l.* which he accepted, and afterwards dishonoured.

28th February, 1819, the supply under the first guarantee ended.

20th May, 1819, the testator signed the following agreement :—

“ Whereas *Joseph Holl* and *Paul Bevan* have, for some time past, supplied *N. Hadley, jun.* with coals on a credit of two months from the delivery, and having been requested to furnish coals to an increased amount, which they have declined to do without having some security for the payment thereof ; and accordingly *N. Hadley, jun.* hath requested the said *Nathaniel Hadley* to become such security, which he has consented to do ; and the said *Nathaniel Hadley* doth, in pursuance of such consent, hereby agree with the said *Joseph Holl* and *Paul Bevan*, that he will pay and discharge all such sums of money as may here-

after become due to the said *Joseph Holl* and *Paul Bevan* for coals sold by them to *N. Hadley, jun.* to any amount not exceeding 300*l.*, in case *N. Hadley, jun.* shall not pay the same within one month after the expiration of the said credit of two months; and the said *Joseph Holl* and *Paul Bevan* agree to give the said *Nathaniel Hadley* a further period of three months for making good any claim which they may have to make under this guarantee; and this guarantee shall by no means vitiate or make void any former guarantee given by the said *Nathaniel Hadley* to the said *Joseph Holl* and *Paul Bevan*; and the said *Nathaniel Hadley* may get rid of his responsibility under this guarantee at any time, by giving notice in writing of such his intention to the said *Joseph Holl* and *Paul Bevan*, when it shall wholly cease and become void from the time of the delivery to them of the said notice.

(Signed) “*Nathaniel Hadley.*”

Coals to a considerable amount were afterwards supplied to *N. Hadley, jun.* by the plaintiffs. But on 28th October, 1819, a further sum of 900*l.* being then due from *N. Hadley, jun.* the plaintiffs refused to deliver any more coals to him. Several applications were made to *Hadley, junior*, on behalf of the plaintiffs, for settlement of the accounts; and on 25th April, 1820, the following agreement, signed by the testator, and addressed to the plaintiffs, was delivered to them.

“Gentlemen:—At the request of *N. Hadley, jun.*, I do hereby consent and agree, in consideration of your extending to him the period of two years and upwards for the liquidation and settlement of the debt due to you upon your present settled account, to reserve to you all right and claim that you may now have against me by virtue of the securities I have heretofore entered into with you on his behalf, and to be bound by the consequence thereof, if, at the expiration of such period, your demand shall not have been fully discharged; such securities, however, not to ex-

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tend to any transactions between yourselves and *N. Hadley*, jun. beyond the day of the date."

April, 1824, *N. Hadley*, jun. went to France.

In 1830, *N. H.*, jun. returned permanently to England, having in the meantime been several times in this country; but, on these occasions, he did not show himself, and his stay was short. In 1830, he was arrested on process, issued on 6th June, 1826, and continued on the roll, at the suit of the plaintiffs. He went to prison, and was, in the following October, discharged under the Insolvent Debtors' Act.

July, 1828, the plaintiffs commenced proceedings against the testator. That action, however, having abated by his death on the 9th of March, 1829, the now pending action was commenced against the defendants, as his representatives, on the 6th of June following.

The above sums of 1500*l.* and 900*l.* are still wholly unpaid to the plaintiffs.

The questions for the opinion of the Court are,—whether the testator ever was liable to pay to the plaintiffs the whole or any part of the sum of 1300*l.* made up of the above-mentioned sums of 1000*l.* and 300*l.*; and if he was, whether the claim has been barred or discharged in any manner. If the Court shall be of opinion that the testator in his life-time was liable to pay to the plaintiffs the whole or any part of the said sum of 1300*l.*, and that the plaintiffs' remedy against the defendants was not, on 6th June, 1829, barred or discharged in any manner, the verdict is to stand for the full amount, or be entered to the extent of the testator's liability accordingly:—but if the Court shall be of opinion that the testator never was liable, or that the plaintiffs' claim was barred or discharged, a nonsuit is to entered.

In Trinity term last this case was argued by

*Platt* for the plaintiffs, and *R. V. Richards* for the defendant.

In this term the judgment of the Court was delivered by

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Lord DENMAN, C.J., who, after stating the substance of those parts of the special case set out above, proceeded as follows:—Many points, which savoured rather of fact than of law, were raised in the argument, on the nature of the dealing, and the mode of keeping accounts between the parties, the effect of payments made from time to time, and how they should be appropriated to the debts. But it seems to me, that, if all these points are conceded to the plaintiffs, they must still be defeated by the Statute of Limitations. For the utmost operation that can be given to the agreement of April, 1820, is, that if *N. Hadley, jun.* should not pay within the time limited thereby, (that is, two years and upwards) the testator would pay. His liability then accrued when the principal had made default after two years and upwards, which was the case in the course of April, 1822, and the action ought to have been brought within six years of that period. None was commenced till *July, 1828.*

The period when the testator's liability attached was sought to be extended, by incorporating into the latest guarantee the condition contained in the earliest,—that no application for payment should be made to the testator “*before the failure of plaintiffs' utmost efforts and legal proceedings to obtain the same from the principal.*” Some doubt may be entertained, whether this condition can, by a just construction, be so incorporated; if it can, it must be read as if the words were “*till after*” failure of the plaintiffs' utmost efforts; otherwise, the plaintiffs would have the power by their own laches to keep alive the surety's liability for ever. The agreement virtually is, (plainly for the surety's protection) that the plaintiffs shall use their utmost efforts against the principal before they call upon the surety. Had *prompt* measures been taken, it might have been difficult to fix the precise period at which they could be

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said to have *failed*, under various circumstances that may be imagined. But when more than *two years*, (during which time the principal was in England,) are suffered to elapse, from the time allowed, upon a debt of long standing, we cannot hesitate to say that the *utmost efforts* were never made, and consequently that the plaintiffs have not performed the condition imposed upon them, which was made precedent to their right to sue on the guarantee. If, then, those words be taken as a part of the latest agreement, they not only furnish no answer to the plea of the Statute of Limitations, but they do furnish one to the action itself, upon the general issue.

Judgment for the defendants.

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SAMUEL and PHILLIPS v. COOPER and LEVEY.

In an action for work and labour, money paid, &c. against two partners, all matters in difference in the cause between the parties are referred to a legal arbitrator. In the particulars of demand in the action, and before the arbitrator, credit is claimed by the plaintiff for the amount of certain cheques given to one of the defendants.


The arbitra-

tor awards a certain sum to the plaintiff, but specially states in his award, that the cheques or the money paid in respect thereof, were claimed as matters in difference in the cause, and declares and determines that they *are not matters in difference* in the cause. Held, that the award is not final, and is therefore void.

**ASSUMPSIT** for work and labour, and money lent, &c. Plea: non assumpsit. At the sittings at Guildhall, after Hilary term, 1833, before *Denman*, C. J., a verdict for the plaintiffs was taken by consent for 15,000*l.*, costs 40*s.*, subject to the award of a barrister, to whom "all matters in difference in the said cause between the said parties" were referred. The award directed the verdict to be entered for 12,929*l.* 9*s.* 8*d.*, and that *Cooper* should pay the costs of the reference. The award contained the following recital and finding:—"Whereas the plaintiffs *have claimed* upon the reference before me, that four several cheques, that is to say, a certain cheque, dated the 28th day of April, 1828, drawn by the said plaintiffs upon Sir *William Curtis* and Company, in favour of the defendant, *Levey*, or bearer, for 50*l.*, and also three other cheques, each in the same form, and for the same sum, and dated respectively the 18th day




of August, 1828, the 10th day of September, 1828, and the 10th day of October, 1828, and the sums of money secured by the said cheques respectively, or paid in respect thereof,—*were matters in difference in the said cause*: now I, the said arbitrator, do declare and determine *that they are not matters in difference in the said cause.*"

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Sir John Campbell, on behalf of the surviving defendant, Cooper, in this term moved for a rule to shew cause why the award should not be set aside on two grounds; first, that the arbitrator had awarded to the plaintiffs a large sum of money in respect of advances of money made by the plaintiffs to Levey alone, with the knowledge that it was applied to other than partnership purposes, and for which, therefore, Cooper was not liable; and secondly, that the award was not final. The first point arose entirely upon affidavits, and the Court held, that the reference having been to a legal arbitrator and the objection relating to matter of *law*, the parties were concluded by the award. The second point was founded upon the above recital and finding, coupled with a statement upon affidavit, that the four several sums of 50*l.* each, mentioned in the award, were by the plaintiffs debited to and charged upon the defendants, and composed part of the particulars of their demand in this action, and of their claim against the defendants carried in before the arbitrator, and insisted upon as being due and owing to them by the defendants, and a matter in difference in this cause. Upon this second ground the Court granted a rule nisi; against which

Pollock, A. G., F. Kelly, and Martin, shewed cause. The reference is of all matters in difference *in the cause* between the parties, which means all matters which might fairly and legally have been brought forward in the cause. The matter, which the arbitrator has in this case decided not to be in difference in the cause, is a claim upon one only of two defendants, and which, therefore, could not

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properly be brought forward in the cause. The finding by the arbitrator, that these are not matters in difference in the cause is tantamount to a finding that the two defendants were not jointly liable. The fact of the amount of the four cheques for 50*l.* having been *claimed* by the plaintiffs does not make it a matter in difference in the cause; and, if it does so, then the objection is apparent upon the face of it, and the Court will not *set aside* the award, but will leave the parties to their remedy, and let the defect, if it be such, be taken advantage of hereafter. *Dunn v. Murray* (a), coupled with *Lord Bagot v. Williams* (b), shews that the defendant has, under this award, all the protection to which he is entitled.

Sir John Campbell and Maule, *contra*. These are matters within the scope of the declaration, claimed by the plaintiffs in their particulars of demand, and claimed again by them before the arbitrator. The matters to be decided upon by the arbitrator, under this form of reference, are matters within the scope of the declaration, which were in dispute between the parties at the time of the reference. These matters were such, and have not been decided on; therefore the award is partial only. The arbitrator himself admits that these are matters in difference, for he states that these sums were *claimed* by the plaintiffs upon the reference. It is said, that the arbitrator's so finding that these were not matters in difference is tantamount to saying that there was no joint liability. But that is not so; it is merely saying, "Upon these items I give no opinion whatever." This award would be no defence for Mr. Cooper to any future action which might be brought against him (c) in respect of these four sums of 50*l.*; therefore he has not the protection to which he is entitled. The two cases cited are clearly distinguishable. If the arbi-

(a) 4 Mann. & Ryl. 571; 9 Barn. & Cressw. 780.

(b) 5 Dowl. & Ryl. 87; 3 Barn. & Cressw. 235.

(c) *i. e.* as surviving partner; the argument on the other side does not go to his liability in his individual capacity.

trator had, in point of fact, considered these four items not to be matters in difference, and had simply awarded that a certain sum was due, it must be admitted that the parties would have been concluded (*b*). That, however, is not the case here.

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Lord DENMAN, C. J., on the last day of the term, said :—  
In this case we have looked attentively over the authorities, and at the affidavits on both sides, and we have come, reluctantly, to the conclusion, that all matters in difference in the cause having been referred to the arbitrator, there are some matters in difference upon which he has not come to any conclusion : and, therefore, that the award must be set aside.

Rule absolute.

(a) Such an award would have been equivalent to a finding that the defendants were not jointly liable upon the cheques. This is probably the view which the arbitrator took of the claim, but

finding that he had no jurisdiction over the amount of the cheques *quà debt*, he seems to have inferred that he had no jurisdiction *quà claim*.

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FOX, *qui tam*, v. KEELING.

**DEBT**, for penalties for usury. The first count stated, that on 5th February, 1830, one *Newton* drew a bill upon *Joyce* for 40*l.*, payable to his own order, which bill was accepted by *Joyce*, and indorsed by *Newton* to the defendants; that *after the said bill became due and payable according to the tenor and effect thereof, to wit, on 12th April, 1830*, it was corruptly, and against the form of the statute &c., agreed between *Newton* and the defendants, who were then the holders of the bill, that 5*l.* only should be paid, and that the bill, as far as regarded the remaining

In debt *qui tam* for penalties for usury in the renewing and discounting of bills, it is necessary to prove that the usurious contract was entered into on the precise day which is laid in the declaration, even though it be laid under a *videlicet*.

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sum of 35*l.*, should be renewed by a bill at two months for 35*l.*, to be dated 8th April, to be drawn by *Newton* upon and accepted by *Joyce*, and to be indorsed by *Newton* to the defendants; and that the defendants should take 5*l.* in part of the 40*l.*, and should also take the last-mentioned bill in renewal of &c., and should forbear and give day of payment of the said sum of 35*l.* from thence until the bill for 35*l.* should become due and payable, according to the tenor and effect thereof; and that *for forbearing and giving day of payment of the said sum of 35*l.** by the defendants to *Newton*, *from the time when the first-mentioned bill became due until the bill for 35*l.* should become due* according to the tenor and effect thereof, the defendants should take from *Newton* 2*l.* 1*s.* 6*d.*; and that in pursuance of this corrupt agreement the defendants did, to wit, on the said 12th April, 1830, take from *Newton* 2*l.* 1*s.* 6*d.* for forbearing and giving day of payment of the said sum of 35*l.* from the time of making the said corrupt agreement in that behalf until the time when the bill for 35*l.* should become due; and that as a further security for the said sum of 35*l.*, and in renewal of &c. (as before), *Newton* did, to wit, on 12th April, 1830, in further pursuance of the said corrupt and unlawful agreement, draw another bill, dated 8th April, 1830, being the day on which the first-mentioned bill became due, upon *Joyce*, and thereby requested *Joyce*, two months after date, to pay to his order 35*l.*, which bill was then accepted by *Joyce*, and indorsed by *Newton* to the defendants; and the defendants, in further pursuance &c., did forbear and give day of payment of the said 35*l.* from the time when the first-mentioned bill became due, until the bill for 35*l.* became due, (the said first-mentioned bill not being paid or satisfied except as to the sum of 5*l.*); and that the sum of 2*l.* 1*s.* 6*d.*, so taken by the defendants in manner and for the cause aforesaid, exceeds the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the form of the statute &c. The declaration contained several other counts, stating similar

transactions; and there was also a set of counts, charging the defendants with usury in the *discounting* of the bills. The usurious contract was in each of these latter counts alleged to have been made, under a videlicet, on a day certain, between the drawing of the bill and its maturity; and the sum of money alleged to have been advanced by the defendants upon discounting the bill fell short of the sum for which the bill was drawn, by an amount far exceeding the legal rate of interest, even calculating the interest from the day on which the bill was drawn to the day on which it would become due.

At the trial before Lord *Denman*, C. J., at the sittings at Guildhall after last Easter term, the usurious contracts stated in several of each set of counts were proved to have been made and executed, but the plaintiff failed to shew in any instance *on what precise day the contract was made*. It was objected, on behalf of the defendant, that the day of making the contract ought to be proved as laid, or that *some* precise day should have been sworn to; and that in the absence of such proof, the defendant was entitled to a nonsuit. The learned judge, however, left the case to the jury, and reserved the point. The jury having found a verdict for the plaintiff upon several of each set of issues, leave was given to the defendant's counsel to move for a nonsuit upon the point reserved. In Trinity term last *Hutchinson* obtained a rule accordingly; against which

*Barstow* now shewed cause. The ground on which the rule was obtained was, that in actions for penalties for usury, it is necessary to prove the *precise* day on which the usurious contract was made. Undoubtedly it is in general necessary that the day of making the contract should be proved, in order that it may be known whether the interest taken is at the rate of more than 5*l.* per cent. per annum; but the offence is sufficiently established, by shewing any combination of facts from which the conclusion that more than the legal rate of interest has been received, is irre-

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sistible. In the cases of *discount*, it appeared that the sums deducted as discount exceeded the legal rate of interest, even upon the supposition that the bills had been discounted on the very day on which they were drawn. Therefore, *à fortiori*, would the transaction have been usurious, if it had taken place at any later day. It is not necessary to shew *by how much* the interest reserved exceeds the legal rate of interest, but it is sufficient to shew that more than 5*l.* per cent. per annum was taken. The cases of the *renewals* are still more clear, because the day from which the time of forbearance is to be calculated is known with exactness. It is of course from the day on which the original bill became due, until the maturity of the bill taken by way of renewal, and the time of making the contract is wholly beside the question. This rule was obtained on the authority of *Partridge v. Coates*(a). That was debt for penalties for usury. The transaction stated in the declaration was, that the defendant lent to one *T. D.* 100*l.* on a day which was laid under a *videlicet*, and forebore and gave day of payment for the same to *T. D.* *from the lending thereof* until the 6th October, and took from *T. D.* 6*l.* 15*s.* for the forbearing and giving day of payment thereof as aforesaid, and that to secure the payment of the 100*l.* *T. D.* indorsed to the defendant a bill for 100*l.* at three months, drawn, dated, and accepted 3rd July, 1824. The money was proved to have been lent on 5th July, and *Abbott*, C. J. held the variance fatal. He said, "I am of opinion that you must, in a declaration of usury, shew, on the face of the record, that the period of forbearance is such that the sum taken for interest is more than the party is by law allowed to take." There the forbearance was stated to be *from the day of lending*. Therefore the day of lending was a material point of time. Here, (especially in the case of renewals,) all that is required, according to the ruling of *Abbott*, C. J., has been proved. [*Lord Denman*, C. J. Can there be any difference between the two

(a) *Ryan & Moody*, 153; 1 *Carr. & Payne*, 534.

classes of cases?] There is none, unless it should be thought necessary to have the two termini of the period of forbearance exactly ascertained, for that rule would be satisfied in the cases of renewals, but not so in those of the discounting transactions. *Partridge v. Coates* was cited in the case of *Harfield v. Levi*, lately decided in the Exchequer, but not yet reported. It was contended, upon the authority of that case, that the precise day was material, though laid under a *videlicet*. One of the judges thought that the case did not go that length, and that if it did he should not be inclined to assent to the doctrine. The case, however, went off upon another point. All the other reported cases upon this statute are distinguishable, and can be maintained on principles not applicable here; *Carlisle v. Trears* (a), *Brooke v. Middleton* (b), *Borrodaile v. Middleton* (c), *Harris v. Hudson* (d)

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*Follett*, S. G. *contrà*. It is not sufficient, in a *qui tam* action for penalties for usury, to prove *any* combination of facts from which the conclusion that the defendant has committed usury necessarily follows; nor is it sufficient to shew the two points of time which form the limits of the period of forbearance. All the authorities shew that the *exact* day of *making the contract*, as well as the *period of forbearance*, must be shewn. Nay, the authorities have gone even further, for they have decided that the day of making the contract must be proved *as laid*, and that even though the day be laid under a *videlicet*. In *Harfield v. Levi*, the contract was stated to have been made on a Saturday. The witness who proved the contract said that it was on a Friday or Saturday, he was not sure which, but he was sure it was *one* of them. The Friday turned out to be *Good Friday*, and it was shewn that the bank at which the parties were said to have entered into the contract was not open on Good Friday. The jury

(a) Cowp. 671.

(c) 2 Campb. 53.

(b) 1 Campb. 445.

(d) 4 Esp. N. P. C. 152.

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found the contract to have been made on the Saturday; and the Court of Exchequer, upon motion, decided that there was evidence to support that finding. Any observation that may have been made by one of the judges as to the necessity of proving the day as laid, was not called for. The witness, in this case, was unable to swear to *any* day as that on which the contract was made; therefore the question whether it is necessary to prove the exact day, when laid under a videlicet, does not arise.

LORD DENMAN, C. J.—I think that this rule must be made absolute. It has been held, that in a penal action for usury, the exact time of making the contract must be stated in the declaration, and must be proved as laid. And it has been decided that even where the day is laid under a videlicet, the contract must be proved to have been entered into on that day. It is demonstrable, in this case, that usury was committed, for the reasons mentioned by Mr. *Barstow*; but it is equally clear that no day of making the contract was proved. We cannot, therefore, say that the precise offence *as laid in the declaration* was proved. It is impossible for us, at this day, to contend with the cases that have been decided upon this point. It seems to me, therefore, that none of the counts of this declaration are proved.

LITLEDALE, J., WILLIAMS, J., and COLERIDGE, J., stated their entire concurrence.

Rule absolute to enter a nonsuit.



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In the Matter of PALMER, Gent. one, &c.

A Rule nisi was obtained, calling upon *John Palmer*, an attorney of this Court, to shew cause why he should not be struck off the rolls for allowing his name to be used by one *Edmonds*, contrary to 22 *Geo. 2*, c. 46, s. 11. That section enacts, that if any attorney shall permit or suffer his name to be in any ways made use of upon the account or for the profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise, in any respect as an attorney, knowing him not to be duly qualified, and complaint shall be made thereof in a summary way to the Court from whence such process did issue, and proof made thereof upon oath, to the satisfaction of the Court, that such sworn attorney hath offended therein, then every such attorney so offending shall be struck off the roll and for ever after disabled from practising as an attorney. Cause was shewn in Michaelmas term, when the matter was referred to the Master, who made a report thereon. The matter was again referred to the Master.

In this term it was moved that the Master should read his report, when the Master made the following report:—
“ In the last term I reported, that in the year 1829 *Palmer* was residing at Coleshill, and also occupying occasionally part of a house in Birmingham, in which *Edmonds* and his family lived—*Edmonds* paying the rent and taxes—*Edmonds* being at the time articulated to *Palmer*, and the name of *Edmonds* being on the door, as also the name of *Palmer*;—that *Edmonds* was in the habit of attending the Court of Requests in Birmingham, and before the magistrates at the public office in Birmingham, and at the petty sessions in Warwick, transacting business as the clerk of *Palmer* nominally, with the knowledge of *Palmer*, but deriving a profit to himself from the business so transacted by him;—that it

the Master's report that the case is *within the statute*, not upon the ground of a *general* jurisdiction of the Court over its officers.

A superior Court is bound, upon summary application under 22 *Geo. 2*, c. 46, s. 11, to order an attorney who is shewn to have allowed an unqualified person to practise in his name in such Court to be struck off the roll.

But that Court only from which the abused process issues, can, upon summary application under this enactment, order the attorney to be struck off the roll.

Where, upon such an application under this statute, the Court referred it to the Master to say whether in any instance the unqualified person had, with the permission of the attorney, practised in that Court, the rule can be made absolute only upon its appearing by

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appeared also that an appeal had been tried in the Court of Quarter Sessions for the county in the name of *Palmer*, in which the client had consulted *Edmonds*, supposing him to be an attorney, and where *Palmer* had permitted *Edmonds* to conduct the proceedings, and had permitted part of the law bill to be paid by the client (who was a tailor) making a suit of clothes for *Edmonds*.

"The above instances arose in the inferior courts or courts of quarter sessions, and I have now to add and submit to the decision of the Court two instances arising in the Court of King's Bench.

"These are, first, that in 1832 several writs were placed in the hands of an officer to be executed, having *Palmer's* name upon them, for part of which *Palmer* afterwards paid him, saying the rest was *Edmonds's* business and not his.

"Secondly, that in 1829-30, an action (*Davis v. Ashford*) was carried on in the name of *Palmer* and with his knowledge and concurrence, in the course of which *Edmonds* appeared and acted as the attorney, and after verdict obtained, claimed to have the costs paid to himself, and objected to their being paid to *Palmer*."

M. D. Hill now shewed cause. Upon this application the Court cannot take notice of the first part of the Master's report, which regards practising in *inferior* Courts, since the 22 *Geo. 2* gives jurisdiction to that Court only whence the process, which has been abused, issued. The attention of the Court will therefore be confined to the cases in which the process issued out of *this* Court. There are means pointed out in the statute, 2 *Geo. 2*, c. 23, of punishing those persons who practise in an improper manner in the Court of Quarter Sessions. They can only be punished on conviction (*a*), that is, a conviction obtained upon an

(a) Sect. 17, "If any person who shall be a sworn attorney of any of the courts of law aforesaid, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process, or to commence, prosecute, follow or defend any action or ac-

indictment. Only two instances are stated in the report of transactions in this Court. With regard to the former of these it is to be observed, that the Master does not report that *Palmer* permitted *Edmonds* to sue out these writs for his own profit. *Edmonds* was the articled clerk of *Palmer*, and the inference that *Edmonds* sued out any of these writs for his own profit cannot be drawn with any degree of certainty. The report should be as explicit as the verdict of a jury. The facts stated are capable of many explanations. The second instance in the report is no finding against *Palmer*, for no concurrence of *Palmer* is found. In many instances the managing clerk acts as attorney. It is contended, on the other side, that the Court has a general discretion to strike attorneys off the roll. If this Court originally had any such power, it will consider that its discretion should be guided by the act of parliament upon which the application is made.

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Follett, S. G. and *Whuteley*, in support of the rule. This is an application to strike *Palmer* off the roll, on the ground that he permitted an unqualified person, for his own profit, to practise in his, *Palmer's*, name. In the affidavits an explicit admission to that effect by *Palmer*, before the commissioners of his bankruptcy, is stated. [*Hill* objected to any reference to the affidavits.] It also appears from *Edmonds's* statement, that *Palmer* permitted him to practise in his name at the assizes. The Court will infer from the report what was the nature of the dealings between the parties. It is manifest from the report that *Edmonds* practised as an attorney with the knowledge and concurrence

tions or other proceedings in his name, not being a sworn attorney of one of the said Courts of Law or a sworn solicitor of the said Court of Chancery, or of some or one of the Courts of Equity aforesaid, and shall be thereof lawfully convicted, every person so con-

victed shall, from the time of such conviction, be disabled and made incapable to act as an attorney in any of the Courts of Law aforesaid, and the admittance of such person to be an attorney of any of the said Courts of Law shall thenceforth cease and be void."

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and in the name of *Palmer*. The report first states the general nature of the business and the connection between the parties; then the transactions in the court of requests,—before the magistrates,—and at the quarter sessions,—and then come two instances arising in this Court. [Lord *Denman*, C. J. The last part of the report may be defective, because it does appear that *Palmer* knew of it.] From *In re Clarke*(a) it appears, that if the Court are satisfied that a charge similar to the present is true, they are *bound* to strike the party off the roll, and it is not strictly necessary to bring the case precisely within the words of the statutes. *In re Clarke* is also an authority to shew that the application against the attorney may be made founded on the general authority of this Court over its officers. It is sufficient to show by affidavits a participation in the profits, *In re Garbutt*(b). The 2 *Geo. 2*, c. 23, s. 17, does however apply to this case. In the case of *Jackson, in re* (c), *Abbott*, C. J. said, that the enacting part must be construed in reference to the preamble. The preamble of the 2 *Geo. 2*, c. 23, s. 17, states, that that act was passed “for the better regulation of attorneys and solicitors practising in any of the Courts of Law or Equity in that part of Great Britain called England.” For *some* purposes the Court of Quarter Sessions is a *superior* Court, and even costs of proceedings in that Court are taxable in this. At all events whether or not this be a case within the meaning of either of the *statutes*, it is sufficient to say that *Palmer's* conduct has been such that he is unfit to remain on the roll. The Court has general jurisdiction over its officers. *Ex parte Whatton*(d).

Lord DENMAN, C. J.—The affidavits which were before the Court on a former occasion stated something very like a *partnership* between *Edmonds* and *Palmer*. The question

(a) 3 Dowl. & Ryl. 260.

(c) 1 Barn. & Cressw. 270, and

(b) 2 Bingh. 74; S. C. 9 B. 3 Dowl. & Ryl. 263, n.

Moore, 157.

(d) 5 Barn. & Alders. 824.

then discussed was, whether the business which *Palmer* permitted *Edmonds* to carry on was business in this Court. We entertained a doubt upon that subject, and the case was sent to the Master to inquire into this matter, in order that the Court might determine whether the 22 Geo. 3 should be enforced. The interference of the Court was not, upon the former occasion, requested by reason of its *general* power. Certainly the Court will not resort to its general power upon a report made upon an inquiry directed with reference to a particular act of parliament. The matter is now brought to the single question whether enough appears to call on this Court to act *under the act of parliament*. We cannot shut our eyes to the general facts of the case. These two persons resided in the same house, and were engaged together in the conduct of business in inferior Courts. From the latter circumstance it is reasonable to presume that they pursued a similar course as to causes in this Court. Two particular examples of the mode of conducting causes in this Court are given in the report. They leave no doubt as to what the Court ought to do, acting upon the principle laid down by Lord *Tenterden* in *Jackson, in re*. The first of these examples is this—in or about the year 1832 several writs were placed in the hands of a sheriff's officer to be executed, with *Palmer's* name upon them. For part of these *Palmer* paid the officer, but as to the rest he referred the officer to *Edmonds*, saying, that they were *Edmonds's* business and not his. That being so, it is impossible not to infer that of the writs thus given, some related to business of which *Edmonds* was to have the *profit*. The latter of these examples is, that in 1829 an action was commenced in the name of *Palmer*, as the attorney conducting the suit, and that after it was concluded *Edmonds* claimed the costs, and refused to allow them to be paid to *Palmer*. It is not indeed stated what ultimately became of those costs, but the report distinctly states that the action was brought with *Palmer's* knowledge and concurrence and in his name, and that in the course of

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it *Edmonds* appeared and acted as the attorney. *Edmonds* was therefore acting with the knowledge and concurrence of *Palmer*. Considering that the particular object of making these inquiries was to ascertain whether *Edmonds* was allowed by *Palmer* to conduct business for his own profit, it is impossible not to come to the conclusion that *Edmonds* was so permitted in proceedings in this Court. This case is therefore distinctly brought within the 11th section of the 22 Geo. 2, c. 46. We have no option with respect to the exercise of our authority, and *Palmer* must consequently be struck off the roll.

LITTLEDALE, J.—The two instances given in the report are not so explicit as the affidavits would make them. As to the first, it is not shewn whether the officer was to be paid by *Palmer* or by *Edmonds*. It appears that when the officer asked to be paid, *Palmer* said, some of these writs are mine and some are *Edmonds's*. At all events this was an admission by *Palmer* that *Edmonds* had the benefit of the profit on some of these writs. With respect to the second instance, the action was brought with the concurrence of *Palmer*. The suit was conducted in *Palmer's* name, yet he did not appear in it, and *Edmonds* claimed the costs. It must be intended that *Palmer* was cognizant of all the proceedings relative to this action.

COLERIDGE, J.—My mind is little disposed to come to a similar conclusion, as the consequences are so highly penal. I struggled against it at first, but I now fully concur in the view of the facts of the case taken by my lord and my brother *Littledale*. When I apply to those facts the principle laid down by Lord *Tenterden*, I think we must conclude that the party ought to be struck off the roll.

Rule absolute(a).

(a) *Vide In the matter of Ross and Hodgson*, Easter term, 1835, *post*.

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PITT, Administrator of PITT, deceased, v. COOMBS.

THE defendant having signed judgment and obtained the Master's allocatur for 42*l.* 10*s.* costs, the plaintiff was taken under a ca. sa. on 21st June, 1833, at his office in Adam Street, Adelphi, whither he had gone to take refreshments on his way from the Court of Exchequer, in which he had been during the day engaged as a party to a suit, to his residence at Somers' Town. The plaintiff applied to a judge to discharge him, on the ground that he was privileged at the time of the arrest. The judge thought that the plaintiff's privilege had ceased, but made an order for his discharge upon payment into Court of the 42*l.* 10*s.* and also 5*l.* for costs. The plaintiff paid the 47*l.* 10*s.* into Court, and was thereupon discharged in pursuance of the order. In the following term (Michaelmas, 1833,) the plaintiff moved in the Outer Court to set aside the proceedings for irregularity, on the ground that the notice of taxation had not been served until the morning appointed for the taxation, and of other defects. *Littledale, J.*, gave his judgment upon the matter in Hilary term, 1834, but referred certain questions of fact to the Master. The Master made his report in Hilary vacation, and in the following term the plaintiff applied for a rule to refer the matter back to the Master. The matter being still pending, the plaintiff, in Michaelmas term, 1834, obtained a rule to shew cause why the 47*l.* 10*s.* should not be paid out of Court to him. This rule was, upon the application of *Platt*, for the defendant, enlarged to this term, on the usual terms of filing the affidavits in answer seven days before the term.

Platt now shewed cause, and took a preliminary objection that the plaintiff had not taken office copies of the affidavits in answer.

A party who had obtained a rule nisi, which was afterwards enlarged, upon the terms of filing the affidavits in answer before a certain day, was permitted to move to make his rule absolute, although he had omitted to take office copies of such affidavits.

Where a party arrested whilst privileged from arrest, pays money into Court by permission of a judge, in order to obtain his discharge, he is entitled, upon application to the Court, to have the money restored to him.

But such application must be made within a reasonable time after the arrest, or the delay must be satisfactorily accounted for.

The pendency of a motion to set aside the proceedings for irregularity, was held to be

a satisfactory reason for having deferred the application for several terms.

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LORD DENMAN, C. J. (after consulting the officers of the Court) said—We find that the rule to which you allude has not been of late strictly complied with in practice. Therefore proceed to the merits of the application.

Platt. The plaintiff was not privileged from arrest, and if he were so privileged, he must, after so long a delay in making this application, be taken to have acquiesced in the arrest, and in the judge's opinion upon the matter.

The plaintiff in person supported his rule, and controverted both the above propositions.

LORD DENMAN, C. J.—This is an application by Mr. *Pitt* to have a sum of 47*l.* 10*s.* restored to him, which he was obliged to pay to purchase his liberty from arrest. We think that the arrest was illegal (*a*), and that therefore the money was obtained from him by duress illegally exerted over him. If, therefore, the matter stood now as it then did, the money ought as a matter of course to be restored to him. But it is objected that the application comes too late, or, in other words, that after so long delay Mr. *Pitt* must be taken to have *acquiesced* in the proceedings; and certainly an application such as this ought to be made within a reasonable time after the arrest. We think, however, that in this case the delay is sufficiently accounted for.

LITLEDALE, J.—I think the rule ought to be made absolute. The arrest was illegal in consequence of the privilege. The only question then is, whether the application is too late or not? In the term following the arrest, Mr. *Pitt* moved to set aside the proceedings for irregularity, which went to the root of the whole matter; and since then a series of applications have been made, which have occupied the whole interval. Upon the whole of the circum-

(*a*) *Vide Pitt v. Coombs, ante*, same party, under circumstances vol. iii. 212, in which the Court very similar, was illegal. decided that another arrest of the

stances, I own that I think that the application is not too late.

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WILLIAMS, J.—There is no doubt whatever upon the question, except so far as relates to the objection of delay. This objection, however, is fairly answered. Mr. Pitt, so far from acquiescing in the arrest, has been constantly struggling against it. First, an application was made to my brother *Littledale* to set aside the proceedings for irregularity, and he gave judgment here on the last day of Hilary term; but referred certain matters to the master. The master made his report in February, 1834, and a motion was in Easter term made to set aside that report,—the effect of which application was to carry him over Trinity term. In Michaelmas term last this application was made. The delay is, I think, satisfactorily accounted for, and therefore this rule ought to be made absolute.

Rule absolute.

WATSON v. WALTHAM and others.

TRESPASS for breaking and entering a dwelling-house &c., in the parish of Cottingham, Yorkshire. Plea: that the dwelling-house &c., were, and from time immemorial had been, a customary tenement of the manor of Skidley, and demisable by copy of court roll; that before the commencement of this suit, 2d May, 1829, the plaintiff was seised of the said dwelling-house &c., in his demesne as of fee, at the will of the lord of the said manor—that being so seised, the plaintiff, without the court of the Master &c., of Trinity College, Cambridge, then lords of the manor, did duly surrender into their hands, according to the custom of the manor, the dwelling-house &c., to the use of *T. O. Atkinson*, his heirs and assigns, according trust, in case of default in payment of money lent by *C.* to *A.* to sell and dispose of the premises when *C.* shall think proper, a request by *C.* is a condition precedent to the power of *B.* to sell.

Quere, whether a power to enter upon copyhold lands is necessarily to be implied from a power to sell and dispose of such lands, in case of non-payment of money advanced by way of mortgage.

Where, by a mortgage deed, *A.* covenants to surrender copyhold land to *B.* upon

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to the custom of the manor, for ever, upon the trusts and to and for the intents and purposes declared of and concerning the same, (for securing the payment to the defendant *Waltham*, his executors &c., 200*l.* and interest,) in an indenture of the same date between the plaintiff of the first part, *Waltham* of the second part, and *Atkinson* of the third part: whereby in consideration &c., the plaintiff directed that *Atkinson*, his heirs &c. should stand seised of the said dwelling-house &c., upon the following amongst other trusts:—in case the plaintiff or his heirs &c., should on the 2d November then next, pay to *Waltham*, his executors &c., 200*l.* and interest, then upon trust to re-surrender and re-assure to the use of the plaintiff, his heirs, &c.; but in case of default in payment of the 200*l.* and interest, or any part of the same, contrary to the true intent and meaning of the indenture, then upon trust that *Atkinson*, his heirs &c., should at any time or times thereafter, when *Waltham* should think proper, sell and dispose of the said premises, and should surrender and assure the same when sold to the purchaser. Covenant, that the said dwelling-house &c. should remain and continue and be to the use of *Atkinson*, his heirs &c., but nevertheless upon and for the several trusts, intents, and purposes, thereinbefore expressed of and concerning the same, and should and might be accordingly peaceably and quietly held and enjoyed, and the rents, issues, and profits thereof received and retained accordingly, without any let, suit, &c. The plea then averred that the plaintiff had not paid the 200*l.* or any part thereof, and that the same still remained wholly due and unpaid:—Wherefore the defendants at the time when &c., as the servants and by the command of the said *Atkinson*, under and by virtue of the said indenture, broke and entered the said dwelling-house &c. The plaintiff demurred to this plea, and assigned as causes of demurrer:—that it does not appear in or by the plea that *Atkinson* was ever admitted by the lords as tenant of the dwelling-house &c., or that the lords ever granted any seisin thereof to *Atkin-*


son, to hold unto him, his heirs &c., for ever, at the will of the lords, according to the custom of the manor;—and that it does not appear in or by the plea that the plaintiff ever delivered to *Atkinson* the possession of the dwelling-house &c., or that the plaintiff was ever dispossessed thereof, or of his legal estate and interest therein, and right to the possession thereof, and to withhold the same; that it does not appear that *Atkinson* had any possessory right or legal interest in the dwelling-house &c. to justify the defendants' entry and trespass therein,—and also that the plea is a bad and informal plea of *leave and licence*.

Joinder in demurrer.

Knowles, in support of the demurrer. The plea is no answer to the declaration. It does not state that *Atkinson*, the surrenderee, was ever admitted by the lords; and without admittance no estate passes to the surrenderee. *Rex v. Lady Mildmay* (a). Nor can the surrenderee enter without admittance, even where the lord, without reasonable cause, refuses to admit him. *Berry v. Greene* (b). The deed, declaring the uses of the surrender, can pass no estate; for the property can pass only by the surrender. But it will be said that this deed amounted in law to a licence to enter; and the main reliance on the part of the defendant will be upon the covenant, that the dwelling-house &c., should *remain, continue, and be, to the use of Atkinson, his heirs &c.*, but nevertheless upon the several trusts thereinbefore expressed of and concerning the same, and should be accordingly peaceably and *quietly held and enjoyed*. A party cannot, by a licence of this sort, be entitled to enter upon a copyhold; for if that were so, admittance might in every case be dispensed with—at least as between surrenderor and surrenderee. [Lord Denman, C. J. The surrenderee cannot have a complete title without admittance. But suppose the surrenderor to make a lease to

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(a) *Ante*, vol. ii. 778; 5 Barn. (b) Cro. Eliz. 349. *Et vide ante*, 481 (c).
& Adol. 251.


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the surrenderee, the latter might enter. Why may he not enter under a *licence*? Though I do not mean to express a final opinion now, it seems to me that there can be no objection to the surrenderor's giving a *licence* to enter upon the copyhold.] This covenant gives only a mere right of action against the plaintiff for breach of that covenant. But assuming that it gives a *licence* or a power coupled with an interest, and that this entry is to be taken as an entry under the *power*, it becomes necessary to see whether the terms of the power have been strictly complied with. It is evident that throughout the whole of the deed an *admittance* is contemplated; for the trusts upon which *Atkinson* is to hold, are to *re-surrender* and *re-assure*, in case the plaintiff shall before a certain day pay the 200*l.* and interest; and in case of default in payment, then upon trust at any time, if *Waltham* shall think proper, to sell and dispose of the same, and to *surrender* and assure the same, when sold, to the purchaser. *Atkinson* is in fact only authorized to enter for the purposes of sale, and then only if *Waltham* shall *think proper*. Now, upon the plea the entry is stated to be by reason of non-payment of the 200*l.*, but it is not stated that the defendants entered at the *request of Waltham*, or for the *purposes of sale*. The entry was not therefore within the power.

Cresswell, *contra*. It is not intended to deny that a surrenderee, before admittance, has no legal estate. The justification depends entirely upon the covenant for quiet enjoyment. [*Littledale*, J. I do not see that the deed gives any power of *entry*.] It is not given in express terms, but it must necessarily be *implied* from the covenants that *Atkinson* might quietly *hold and enjoy*, and take the rents, issues, and profits. The party could not have the benefit of this covenant unless he had a power to enter. If the plaintiff were to recover in this action, the defendant would have a cross-action against the plaintiff for breach of his covenant. The Court will, in order to avoid circuitry


of action, rather imply a power to enter, from the covenant for quiet enjoyment, *Dean v. Newhall*(a), Serjt. Williams's note to *Turner v. Davis*(b). There is nothing in this deed making a request on the part of *Waltham* a condition precedent to *Atkinson's* entering. The assent or request of *Waltham* is required only in case of a sale of the property. The covenant for quiet enjoyment is quite independent of that clause in the deed which gives to *Atkinson* the power to sell. [*Littledale, J.* In your plea you state only that the 200*l.* and interest was due, and that, therefore, under and by virtue of the indenture you broke and entered the premises. Does that sufficiently shew that you entered under the power?] This is not one of the special causes of demurrer assigned, and that being so, the general statement that the defendants entered as the servants of *Atkinson*, under and by virtue of the indenture, must be taken as meaning that they entered in exercise of the power given to them by that indenture.

Knowles in reply. The question appears to be resolved into this:—whether it sufficiently appears that the defendants entered in execution of the power. *Atkinson* is not authorized to enter except upon the request of *Waltham*; for if *Atkinson* had any power to enter, it must be under that part of the deed which makes the request of *Waltham* necessary. The covenant for quiet enjoyment recognizes the trusts. Therefore any interest which he takes under that covenant must be subject to the trusts. Then what are those trusts? They are, in case of payment of the 200*l.*, to re-surrender to the plaintiff, and in case of non-payment, then upon trust to sell and dispose of the premises, *if Waltham shall think proper*. *Atkinson* is not authorized to enter at all, except in case of non-payment, for the purpose of selling and disposing of the property; and the covenant which has been relied on is only for quiet enjoy-

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(a) 8 T. R. 168.

(b) 2 Wms. Saund. 149.


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ment in case he should enter for the purposes of sale. The power to enter is not, indeed, necessarily to be implied from the power to sell and dispose of the premises; but, without further discussing that point, it is sufficient to shew that it does not appear, upon these pleadings, that the entry *was* for the purposes of sale, or that it was made at the request of *Waltham*.

LORD DENMAN, C. J.—This is an action of trespass for entering the plaintiff's premises. The defendants justify their entry as servants of *Atkinson*, under and by virtue of a certain deed. That deed is supposed to give *Atkinson* a general licence to enter; but I think that it gives no such power. The deed gives to *Atkinson*, who is made a trustee, certain powers for the purpose of securing 200*l.* lent by *Waltham* to the plaintiff. He has power to sell, if requested so to do by *Waltham*. There is, however, no averment in the plea that the defendants entered for the purpose of enabling *Atkinson* to sell; and indeed I do not think that, for the purpose of selling, it was necessary that he should enter: nor is it alleged that the entry was made at the request of *Waltham*. These are, I think, fatal objections to the plea. The covenant which has been relied on is only for the quiet enjoyment by *Atkinson*, for the purpose of quieting his execution of the trusts of the deed.

LITLEDALE, J.—I think that the plaintiff is entitled to judgment. This is the common case of a mortgage—a mortgage, however, of copyhold; and it is agreed that the surrenderee cannot enter *under the surrender* until after admittance. But it is argued that a power of entry is given by this deed in case of non-payment of the money lent. I own that I should have thought that *Atkinson* would have had such general power to enter, if it had not been qualified by those words, “when *Waltham* shall think proper.” These words, I think, make a *request* by *Waltham* a condition precedent to the power of entry or of sale by *Atkin-*

son; and this is a very reasonable condition, seeing that *Atkinson* is merely a trustee for *Waltham*. With regard to the covenant for quiet enjoyment, that is subject to *the trusts before mentioned*, and is therefore governed by the stipulation as to the request by *Waltham*.

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WILLIAMS, J.—I am of the same opinion; and I am in possession of a short note of a late learned and lamented judge(a), from which it appears that he was also of opinion that this plea was insufficient.

Judgment for the plaintiff.

(a) Mr. Justice Taunton.

In the matter of WALMESLEY, Gent. one &c.

CRESSWELL, in the last term, obtained a rule calling upon *Walmesley*, an attorney of this Court, to shew cause why he should not deliver up to *Moses Hatfield* all the title-deeds, books, papers, &c. which belonged to the late *John Braddick*. The affidavits stated that *Moses Hatfield* and *George Hatfield* were executors of the late *John Braddick*, who left his property to the executors in trust for his three daughters. *Walmesley* was employed by the executors as their attorney, and in that character obtained possession of the papers, &c. of the testator, and managed the executorial affairs. After the death of *George Hatfield* also, *Walmesley* continued to act as the attorney and agent of

Where a rule nisi calling upon an attorney to shew cause why he should not deliver up deeds, &c. to his client, has been obtained and enlarged, the attorney may shew for cause that in the intervening vacation, he was, by an order of the Court of

Chancery, required to deliver the same deeds, &c. into the hands of the officer of that Court, upon a day earlier than that on which such cause is shewn.

The Court will not order an attorney to deliver up papers, &c. when by an order of another Court such attorney has been required to deliver them up to the officer of the latter Court.

When deeds, &c. of a testator are delivered to an attorney in that character by an executor, to whom the testator devised his property in trust for other persons, the attorney cannot, against an application by the executor to the Court to compel him to return those deeds, excuse himself on the ground of an equitable interest under the trusts personally vested in him, the attorney.

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Moses Hatfield, the present applicant. *Walmesley* had married one of the daughters of the testator, and in her right had become beneficially interested in the property. A bill had been filed in Chancery against *Moses Hatfield* and *Walmesley*, at the suit of the other parties beneficially interested, to compel them to deliver an account. This rule was obtained by *Moses Hatfield*, on the ground that he wanted the papers, &c. for the purposes of the suit.

Follett, S. G., now shewed cause. Upon this case coming on to be heard in last term, it was postponed in order that it might be ascertained whether these papers, &c. would be required in the Court of Chancery. That Court has since ordered that *Walmesley* should deliver up the papers to the officer of the Court, which has been done. *Walmesley* has not the power to obey this rule, if made absolute; and therefore the Court will discharge it.

Cresswell, *contrà*. This rule ought to be made absolute. If that be not done, the applicant will be defeated by matter arising since the rule was obtained, and which may have been brought about by collusion between *Walmesley* and the plaintiffs in the suit in Chancery. Had *Walmesley* honestly resisted the application, the order would not have been made. [*Littledale*, J. We cannot inquire into a matter of that sort.] *Walmesley* ought to have delivered up the papers when first called upon to do so. It is true that if this rule is made absolute, *Walmesley* will be placed in a difficult situation, but the fault is his own in having resisted a just demand.

LITLEDALE, J. (a)—I think that the rule must be discharged. There is no doubt as to the power of the Court to compel one of its officers to deliver up deeds, &c. in his possession as attorney or solicitor. *Walmesley* was soli-

(a) Lord Denman, C. J., had left the Court.

citor to the executors, and as such received these deeds. He has also an equitable interest in all that belonged to the testator; but this he could not set up in answer to *Moses Hatfield's* application to have the deeds &c. returned to him. It seems, however, that a bill has been filed in Chancery against both these parties, and that an order has been made, since the last term, that on the first day of this term the deeds &c. should be delivered to the officer of the Court of Chancery. We have no affidavit of obedience to this order, nor could we have such affidavit according to the practice of this Court. But this we know, that if *Walmesley* did not deliver up the deeds &c. in pursuance of this order, he would be liable to an attachment for a contempt. These deeds &c. must be taken to have been handed in to the officer of the Court of Chancery, according to the regular course of the administration of justice. If we were to make this rule absolute, it is quite clear that *Walmesley* would be liable to an attachment in one Court or the other. Mr. *Cresswell* says that he would not have been in this difficulty if he had done his duty in the first instance, by delivering up the deeds &c. That is very true; but then it must be taken that they would now have been handed in to the Court of Chancery, in just the same way, if they had been in the possession of *Moses Hatfield*; so that *Moses Hatfield* is in no worse situation than if *Walmesley* had delivered up the deeds to him. In either case he may have inspection and make extracts. We cannot make an order commanding an attorney to deliver up that which he cannot have in his hands.

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WILLIAMS, J., concurred.

Rule discharged (a).

(a) And see *Lord v. Wormleathley*, 5 Mann. & Ryl. 600, and 10 Barn. & Cressw. 858.
leighton, 1 Jacob, 580; *Hunter v.*

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The KING v. HALL and DYER, Esquires.

This Court will not issue a mandamus to compel magistrates to issue a distress-warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal (a), and the rates are recoverable by another mode of proceeding.

Where, by a local act for the government of a parish, *collectors of the rents of houses, &c.* within the parish, "the yearly assessment or valuation whereof respectively shall be less than 30*l.*," are made liable to be rated, and compellable to pay the rates in respect of such houses, &c.—*Seem*, that the liability of the collector would extend only to cases in which the *real*, and not the *assessed* value of the houses respectively, &c. is under 30*l.*

A Rule nisi for a mandamus was obtained, commanding Messrs. *Hall* and *Dyer*, two justices of the peace for Middlesex, to make and issue their warrant of distress against the goods of *James Veale*, to enforce payment of a poor-rate for the parishes of St. Giles in the Fields and St. George, Bloomsbury, in respect of his receipt of the rent of certain houses.

By 11 *Geo.* 4, cap. x. for the regulation of the affairs of the two parishes, a vestry was reconstituted. By section 88, all rates were to be paid by the tenant or occupier; and if any tenant, occupier, or any other person made liable to pay any rate, should refuse or neglect to pay the same after demand made, payment of the rates might be enforced by distress. By section 92, the lessors, landlords, and owners of all houses, &c., the yearly *assessment or valuation* whereof should be less than 30*l.*, or which should be let at rents which should become payable or be collected at any period shorter than quarterly, and in certain other cases, were to be rated and pay the rates in respect of such houses, &c. By section 93, to prevent any dispute touching the designation of lessors, landlords, or owners of houses, buildings, &c. intended to be made liable to the payment of any rate, the persons authorized to receive or collect the rents of any houses from the tenants or occupiers thereof were to be deemed and taken to be the lessors, landlords, or owners of such houses, &c. for the purposes of that act, and to be liable to be rated, and to be compellable to pay the rates, in all cases in which either lessors, landlords, or owners, were by that act made liable

(a) And see *Rex v. Justices of Bucks*, 2 Dowl. & Ry. 689, and 1 Barn. & Cressw. 485; *Underhill v. Ellicombe*, MacL. & Younge, 450; *Fawcett v. Foulis*, 1 Mann. & Ry. 102, and 7 Barn. & Cressw. 394; *Rex v. Justices of Bucks*, *ante*, vol. iii. 68.

to be rated and to be compelled to pay such rates, unless the real lessors, landlords, &c. should declare themselves, and should voluntarily pay such rates as aforesaid, or should be distinctly or certainly known to be such by the vestrymen. By section 95, the goods of all persons occupying any houses, &c. liable to the payment of the rate, wherever the lessors, landlords or owners were, by that act, made liable as aforesaid, were to be liable to be distrained upon for any rates accruing during the occupancy of such persons respectively, although such persons were not rated under that act. By section 96, in default of payment of any rate in respect of any houses assessed at less than 30*l.*, &c. the same was to be a charge upon such houses, and might, after fourteen days' notice, be recovered from the landlord or owner by action of debt.

A rate was made upon *Veale* as the collector of the rents of fourteen houses in various streets, &c. in St. Giles's, which houses are part of an estate consisting of 150 houses, called *Spencer's* estate. Mr. *Spencer*, a gentleman residing in Wales, was seised in fee of these houses, and *Veale* was the collector of his rents. One of the vestrymen was a tenant of another part of Mr. *Spencer's* estate, and was aware that Mr. *Spencer* was the owner of the 150 houses, and that *Veale* was only his collector. All the houses were assessed at less than 30*l.* a year, but six of them were actually let for upwards of 40*l.* a year. Six others were let at rents under 30*l.*, but the rent was payable quarterly, the tenants undertaking to pay all the parochial taxes. *Veale* had paid over to Mr. *Spencer* all the rents collected by him. An application having been made to Messrs. *Hall* and *Dyer*, to issue their warrants to enforce the payment, by *Veale*, of the rates upon the said houses, they refused to do so.

Sir *John Campbell* now shewed cause. The Court will not compel magistrates to issue a warrant for enforcing the payment of rates, if there be another mode of recovering them, or if it is doubtful whether the warrant would not be

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illegal. The warrant here *would* be illegal on two grounds:— First, the section limits the liability of collectors of rents to cases in which the yearly assessment or valuation is less than 30*l.*, and to certain other cases. Some of the houses in question are let for more than 30*l.* a year, and therefore are not, it is submitted, within the limits of the clause, notwithstanding that the amount at which the vestry have thought proper to *assess* them falls short of that sum. Secondly, the liability of the collectors of rents is further limited, by section 93, to cases in which the landlord is not known to the vestry. In this case the landlord must be taken to have been known to the vestry, as one of the vestrymen, who was indeed the chairman of the vestry, was aware that these houses belonged to Mr. *Spencer*, and that *Veale* was only his collector.

There is in this case another mode of recovering these rates. By section 96, the rate is to be a charge upon the premises, and after fourteen days' notice may be recovered, by action of debt, from the landlord.

Thesiger and *Adolphus*, in support of the rule. If it appear to the Court that these rates are clearly recoverable by a distress warrant, the Court will put the law in motion, and issue a mandamus. By section 88, if any tenant, occupier, or any other person made liable to pay any rate, shall refuse to pay, a distress-warrant may be issued. It is obvious, from the language of this section, that some other person besides the tenant or occupier is liable to be distrained upon for these rates. By section 92, the *owner* is to be liable where the yearly *assessment or valuation* is under 30*l.* It is therefore immaterial what the *rent* is. By section 93, the *collector* of the rents of such properties is to be treated as the owner, unless the owner is known to the vestry. The owner in this case was unknown to the *vestry*, notwithstanding that he appears to have been known to one of the vestrymen. *Veale*, as collector, was consequently liable to be rated. But it is said that there is

a remedy by action of debt. Is that an exclusive or is it a cumulative remedy? The 95th section shews that it was only intended as one of several *cumulative* remedies, as it also expressly makes the goods of the occupier liable to be distrained for rates which have become due during his occupancy. Looking at the several clauses of this act, there can be no doubt but that a distress warrant might legally have issued against *Veale*; and therefore the Court will make the rule absolute.

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Lord DENMAN, C. J.—This is a very large and extraordinary power that is given to the parish, to call on collectors of rents for the payment of the rates. I think there may be very good sense in making these collectors, who actually have the profits of the estates in their hands, liable to pay the rates to the parish: but before the Court can compel the issuing of a warrant of distress on the goods of the party, we must see very distinctly indeed that the act gives that authority. I confess I very much doubt, upon all the points in this case, whether that authority is given. I have some doubt whether, when it is said “assessed at 30*l.*,” the meaning was not “assessed on a *rent* of 30*l.*” I have some doubt upon that, though perhaps the words of the statute would import that the *assessment* should be 30*l.*; yet I believe it is very common to consider that the assessment *ought* to be made upon the true rental, so that such phrase might possibly mean that (*a*). The parish have, in addition to the remedy by distress, a power of *suing* the owner of the estate wheresoever he may be; and it is provided that at all times the estate shall continue charged with the payment of the rates. That being so, I think that we ought not to compel magistrates to issue their warrant of distress in the manner prayed. It ought to be

(*a*) Otherwise the vestry would appear to have the power (by altering, or omitting to alter, the nominal standard of the assessment, which is frequently below the real value,) of bringing whatever houses they thought proper within the provisions of this section of the act.

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very distinctly shewn that it is the duty of the magistrates to issue a distress-warrant before we call upon them to expose themselves to the risk of an action. That does not appear in this case. I think therefore the magistrates are quite justified in having refused to issue this warrant.

LITLEDAL, J.—This rule should be discharged. I think that this Court ought not to call upon magistrates to issue a distress-warrant, unless the case is perfectly clear, and there is reason to suppose that the magistrates act from some kind of bias, or that they wilfully withhold the warrant. We are bound to see that they are *bonâ fide* discharging their duty in refusing the warrant; but if we find the magistrates acting *bonâ fide*, a very strong case ought to be made out to induce this Court to call upon them to issue a warrant which may subject them to an action, against which there appears to be no indemnity;—more particularly in this case, for there is another remedy given by the 96th section.

It is much to be regretted that in these acts of parliament, where magistrates are called upon to issue warrants, there is not a clause introduced indemnifying them against actions, when they issue warrants under the authority of this Court. Were such a clause introduced, the magistrates, when acting under the authority of this Court, would run no risk, and the Court would not have the same difficulty in granting a mandamus.

WILLIAMS, J.—We ought to be very cautious how we interfere, by mandamus, to enforce that remedy by distress which, it is very clear, might not only place the magistrates in a difficulty, but also place Mr. *Veale* in a very extraordinary position. We ought very clearly to see that the case is brought within the provisions of the act, before we venture to interpose. I am by no means satisfied that we ought not to have some more distinct statement of the absence of knowledge, by the vestry, of who was the owner

of this property. If I were left to conjecture, I should rather say that the vestry were *not* in ignorance upon this point. Without however entering further upon that question, it appears to me that there is another remedy, and that we should not be shewing a due regard for the safety of these magistrates, if we issued this mandamus.

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Rule discharged.

Sir *J. Campbell* then applied for costs; but as Mr. Costs. *Spencer*, and not the magistrates, shewed cause, the Court discharged the rule *without costs*.

BOWMAN v. ROSTROW.

COVENANT. The declaration and pleas in this case were the same, *mutatis mutandis*, as those in *Bowman v. Taylor (a)*. In this case however *issue was taken*, whereas in that the plaintiff had *demurred* to the pleas.

At the trial before Lord *Denman*, C. J., the plaintiff put in the deed by which the licence to use the patent had been granted. The defendant tendered evidence in support of his pleas, and consequently in contradiction of the allegations in the deed. The Lord Chief Justice thought the evidence inadmissible, and rejected it. The plaintiff had a verdict. *F. Pollock* afterwards obtained a rule nisi for a new trial, on the ground that the evidence ought to have been received.

At nisi prius the defendant is entitled to produce evidence in support of a plea upon which issue is taken, though such plea be bad, as being repugnant to the admission of the parties on the record.

As where in a declaration in covenant, certain recitals in the deed are set out, and the defendant pleads in denial of the facts contained in such recitals, and issue is taken on such denial.

Follett, S. G. and *Tomlinson*, now shewed cause. In *Bowman v. Taylor (a)*, in which similar pleas to a similar declaration were demurred to, the Court held the pleas bad on the ground that the defendant was *estopped* to deny that which he had admitted by deed. The evidence which

(a) *Ante*, 264.

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was in this case tendered was rightly rejected, for this was in principle an attempt by a tenant to deny his landlord's title, which cannot be allowed; *Doe d. Bullen v. Mills* (a). If these pleas are clearly bad on demurrer, as the Court unanimously held in *Bowman v. Taylor*, evidence offered in support of them at the trial ought not to be received. If the evidence had been received, and the verdict had been found for the defendant, the plaintiff would have been entitled to judgment *non obstante veredicto*. It is the understood practice, that in the cases of landlord and tenant, where there is a general declaration and a general issue, the Court and jury are as much estopped from receiving evidence to deny the landlord's title, as the defendant is estopped from denying it *in pleading*. [*Patteson, J.* I quite admit that to be so in the case of the general issue pleaded, because that does not put in issue the landlord's title. But are you aware of any case in which it has been held that a judge at *nisi prius* has a right to reject clear evidence in support of a plea upon which a specific issue is raised?] No such case can be pointed out.

Pollock, A. G. contra, was stopped by the Court.

LORD DENMAN, C.J.—I certainly think that the defendant is clearly entitled to a new trial. The evidence tendered was clearly applicable to the issues, and ought to have been received.

Rule absolute.

Follett, S. G., applied for leave to amend his plea.

Pollock, A. G., consented, on condition that *both* parties should have leave to amend.

PER CURIAM—Leave for either party to amend without costs.

(a). *Ante*, 25.

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DOE *d.* MARSHALL *v.* ROE.

MILNER, on 22d January, moved for judgment against the casual ejector. His affidavit stated, that a copy of the declaration in ejectment had been, on the 10th January, left with the son of the tenant in possession, at the house of the latter. On the 12th (*a*), the deponent saw the tenant in possession himself, when he said that he had seen the declaration, but without specifying *when* he had seen it.

Where a declaration in ejectment is served upon the son of the tenant in possession before the first day of term, and the latter afterwards acknowledges that he has received the declaration, such acknowledgment is not sufficient

Per CURIAM—

Rule refused.

(*a*) The first day of the term, the 11th having fallen on a Sunday.

to entitle the plaintiff to a rule for judgment against the casual ejector, unless it appear thereby that the declaration came to the hands of the tenant before the first day of term.

The KING *v.* The Inhabitants of FAKENHAM.

AN order of justices, whereby *Stephen Carter*, and wife, were removed from the hamlet of Heigham, in Norwich, to the parish of Fakenham, in Norfolk, was confirmed, subject to the following case:

In order to prove a settlement in Fakenham, the respondents produced the will of *John Norman*, dated 19th February, 1720, whereby certain real estates were devised to trustees and their heirs, upon trust, (at certain intervals after testator's death,) to put to school, and at the age of fifteen to bind out apprentice to some trade, a son of some one of his or his first wife's relations, until the whole number of boys together in being, that should be thus put

A. is apprenticed to *B.*, who was a tinman, by the trustees of a charitable fund, and the premium paid out of that fund. *A.* serves *B.* 3½ years, when, at *A.*'s request, *B.* verbally, and without the knowledge of the trustees, consents that *A.* shall serve the remainder

of his time with *C.*, a plumber, and agrees "to give to *C.* 6*l.* as part of the 15*l.*, paid as a premium on the binding of *A.*, for taking him:"—Held, that the 6*l.* was a valuable consideration paid to *C.* "other than what was given by any parish or township, or any public charity," and that, therefore, the transfer of *A.* to *C.* was void for want of a stamped assignment, under 35 Geo. 3, c. 184, Schedule I., *Apprenticeship*.

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to school and provided for, should amount to thirty. And the testator directed, that as often as there should be a deficiency of the descendants of his or his first wife's relations, the trustees should put to school and place out apprentice a son or sons of some inhabitant or inhabitants of Beer Street Ward, or Upper Conisford Ward, in Norwich, or of the parish of Catton, in Norfolk; and the testator directed, that at the end of sixty years after his decease, the number of boys should be increased by two, three, or four, in a year, until it reached 120 of his or his said first wife's descendants, if they could be known or made out by his trustees; and if not, of such others as aforesaid, out of Beer Street or Conisford Wards, and Catton, if enough were there to be had; if not, out of the neighbouring parishes in Norwich, at the discretion of his trustees,—such children of strangers to be chiefly of such parents as had been reduced by losses, and had paid to church and poor.

An indenture of apprenticeship, dated 1st February, 1821, not stamped, was then produced, by which the pauper, with his father's consent, bound himself apprentice to *H. Vincent*, of Norwich, tinman, to learn his art, for seven years, at a premium of 15*l.*, stated in the indenture to be paid to the master by *George Morse*, the treasurer appointed according to the will of *Norman*, for the purpose of annually binding out poor children apprentices; and *Vincent* covenanted with the pauper and his father and *Morse*, to teach the pauper the art or mystery of a tinman, and to pay the father 3*s.* a week for the first year, and an additional shilling a week during each succeeding year of his apprenticeship. The indenture was executed by *Vincent*, the pauper, and *Morse*. The pauper was bound out as the son of a relation of *Norman*, or his first wife. The premium was paid out of the rents of the trust estates, and the indenture was prepared by the clerk to the charity, and paid for by the charity. There never had been a deficiency of the sons of such relations, and no stranger had had the

benefit of the bequest. The pauper served *Vincent* in Norwich, under the indenture, for about three years and a half, when, at the request of the pauper, (who was still a minor,) *Vincent* consented that he should serve the remainder of his time with his (the pauper's) brother, in his trade of plumber and glazier, and agreed to give to the brother 6*l.*, as part of the 15*l.* paid as a premium on the binding of the apprentice, for taking him. In pursuance of this agreement, *Vincent* returned to the pauper 6*l.*, as part of the premium received with him. For this sum the pauper accounted with his brother. There was no agreement in writing between the first and second masters, or between the pauper and his second master. The pauper served his brother two years, and was taught by him the trade of a plumber and glazier, and during that time slept in Fakenham. Neither the trustees under *Norman's* will, nor the treasurer, were parties to the agreement with the pauper's brother.

The counsel for the appellants objected to the indenture's being received in evidence, for want of a stamp, but the Court received it and confirmed the orders of removal.

If this Court shall be of opinion that the indenture required a stamp, either originally or upon the pauper's going to serve his brother,—or that the service with the brother was insufficient to confer a settlement, either on the ground that the trade of the brother was different from that of his first master, or that neither of the trustees nor the treasurer were parties to the agreement between his master and brother, the order is to be quashed;—otherwise to be confirmed.

Austin, in support of the order of sessions. If this was a public charity, the indenture did not require a stamp (*a*).

(*a*) 55 *Geo.* 3, c. 184, Schedule, Part I. title "Apprenticeship."
"Exemptions from the preceding and all other stamp duty."

"Indentures, or other instru-

ments for placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public charity; or pursuant to the

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 First point:
 Public charity.

This was a *public charity*, as the bequest was of a permanent nature, and extended to a *class* of persons; *Rex v. St. Matthew's, Bethnal Green* (a), *Rex v. Clifton-upon-Dunsmore* (b). The object of the exemption in the stamp act, was to encourage institutions useful and beneficial to the public. The devise not only provides for the descendants of the testator and of his first wife, but likewise for the *inhabitants of the surrounding district*. The charity therefore is for the benefit of the *public*. This is not like the case of a devise to *individuals* by name. If this is not a public charity, neither is the charity of William of Wykeham.

Second point:
 Stamp on assignment.

II. It is said, on the other side, that even assuming this to be a public charity, a stamp on the assignment was necessary. No such stamp was requisite. It cannot be said that the 6*l.* paid to the brother, was "a valuable consideration given to the new master, other than what may have been given by any public charity," and therefore the assignment is within the express words of the exemption in the Stamp Act.

Third point:
 Non-concurrence of trustees in assignment.

III. Another objection is, that the apprentice could not be assigned without the participation of the trustees. The concurrence of the trustees to the assignment was not necessary, as their duty is only to supply the money for the premium to be paid to the master, and as soon as they have paid the money their duty is at an end. If the money is provided by them, it appears not to be necessary, to bring the case within the exemption clause of the Stamp Act, that the trustees of the charity should have executed even the original indenture; *Rex v. Quainton* (c).

act of the 33d year of his majesty's reign, for the further regulation of parish apprentices:

And all assignments of such poor apprentices, provided there shall be no such *valuable consideration* as aforesaid, given to the new

master or mistress, other than what may have been or shall be given by any parish or township, or by any *public charity*."

(a) Burr. S. C. 574.

(b) Ibid. 697.

(c) 2 Maule & Selw. 338.

IV. It will be contended that the service under the second master was not consistent with the indenture. The difference of trades is not of itself a sufficient objection; *Rex v. Louth(a)*, *Rex v. Banbury(b)*.

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Fourth point:
Constructive
service.
First point.

Biggs Andrews, contra. I. This is a *private*, and not a *public* charity. At all events the charity was of a *private* nature at the time when this indenture was executed, for then no one had had the benefit of it, except the descendants of the testator or of his first wife. It is laid down in *Nolan's Poor Laws(c)*, that the criterion of a *public* charity is, that the *object* of the charity should be *general*, without having any particular individuals in contemplation at the time it is created. [Lord Denman, C. J. Is not this very like *Founders'-kin*?] That would be the *same* case, *idem per idem*. As this is not a binding out under the *latter* clause of the will, the question must be considered as if the devise were for the *exclusive* benefit of the descendants. Surely, in that case, the object of the charitable bequest would be of a *private* nature. In *Rex v. St. Matthew's, Bethnal Green(d)*, the objects of the charity were—all poor children brought up at the charity school of the parish. Here, the objects are the descendants of two individuals. Whether a charity is public or private, depends not upon its *permanency*, but upon its being or not being an institution *for the benefit of the public*. An indenture is exempted from the payment of duty *to the public*, where the premium is paid out of a charitable fund of a *public* nature, because the *public* have the benefit of the premium.

II. The *assignment* required a stamp. It cannot be said that this 6*l.* was paid *by the trustees*. It was a valuable consideration paid *by the first master* to the new master, to change the relation between himself and the apprentice. It was in the nature of a new binding out, at

Second point.

(a) 2 Mann. & Ryl. 273; S. C. (c) P. 526, 4th edition.
8 Barn. & Cressw. 247. (d) Burr. S. C. 574.
(b) 3 Barn. & Adol. 706.

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the expense of the first master. The trustees had no participation in it. (The Court called upon *Austin* to answer this objection.)

Austin. It is expressly found that the 6*l.* was agreed to be given to the new master for taking the pauper, "*as part of the 15*l.* paid as a premium on the binding of the apprentice,*" and that the 6*l.* was returned by *Vincent* to the pauper "*as part of the premium which he had received with him.*" [Lord *Denman*, C. J. I think the meaning of the expression in the case, that the first master agreed to give to the brother 6*l.* as part of the 15*l.*, paid as a premium on the binding of the apprentice, is, that it was calculated that 6*l.* would be a *fair proportion* of the 15*l.* It could not be intended that the 6*l.* was *part* of the *identical* 15*l.*] The words are, 6*l.* *as part* of the 15*l.*

LORD DENMAN, C. J.—In this case, it was the *old master* that paid the new. The statement in the case, that the 6*l.* was paid *as part* of the old consideration, paid out of the charitable fund, must be construed consistently with the facts of the case. It must be taken to mean that the 6*l.* was considered a *fair proportion* of what the original money was,—not that it was a *part* of the original money.

LITLEDALE, J.—The object of the will was, that every thing relating to the apprenticeship should remain in the hands of the trustees. A new arrangement was made, both as to the service and premium, to which the trustees were no parties. Whatever exemption, therefore, belonged to the transaction originally, it was taken away when the master stood by himself, and a transfer took place with which the charity had nothing to do.

WILLIAMS, J. concurred.

Order quashed.

FILMER v. LYNN.

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ASSUMPSIT for goods sold and delivered. Plea : non assumpsit. This case was tried before the under-sheriff of Middlesex, in Michaelmas vacation, when the following facts appeared :—

The plaintiff is an upholsterer in Berners-street, and the defendant a gentleman holding a situation in Chelsea Hospital, and residing in Pimlico.

In October, 1833, the wife of the defendant, accompanied by her sister, called on the plaintiff, and after representing herself to be the wife of the defendant, stated that she wished to have some goods, which she specified, sent to *her mother's in King-street, Commercial-road*, and that her husband would pay for them. The plaintiff on the following day saw the defendant on the subject, but what passed between them did not appear. The goods were sent to King-street as ordered, and the defendant accepted a bill for the amount. The bill becoming due in May, 1834, was paid by the defendant, who on that occasion ordered an article of the plaintiff for himself, the price of which was 1*l.* 4*s.* This article was furnished by the plaintiff, and the price was tendered by the defendant before the trial, and was subsequently paid into Court.

In June, 1834, the defendant's wife, accompanied as before by her sister, again called at the shop of the plaintiff, and ordered some more goods to the amount of about 11*l.* in the defendant's name, to be sent to the house of *her mother, then residing in Burdett-place*. The goods were sent by the plaintiff, and it was to recover the value of them, and of the article furnished to the defendant, that this action was brought.

At the times when these transactions took place, the defendant and his wife were living together in harmony, but in October, 1834, the defendant turned his wife out of his house for some alleged misconduct, and at the end of November served the plaintiff with a written notice, dated

A., the wife of *B.*, orders goods of *C.* to be sent to the house of *D.*, a relation of *A.*'s. *C.* on the following day sees *B.*, and *B.* accepts a bill for the price, which he pays at maturity. At the time of paying the bill *B.* orders goods of *C.* to a small amount for himself. *A.* subsequently orders other goods of *C.* to be sent as before to the house of *D.* Held, that there was evidence to go to a jury of *B.*'s having so conducted himself as to lead *C.* to believe that *A.* had *B.*'s authority to order the last-mentioned goods.

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November 22d, in which he stated that his wife had left him, and that all persons selling or lending to her, or trusting her, would do so at their own peril, for that he would not be accountable to them.

The defendant denied his liability beyond the 1*l.* 4*s.* which he had paid into Court; and he contended that the above evidence was not proof of agency. The under-sheriff left it to the jury to say whether the defendant had so conducted himself as to lead the plaintiff to believe that his wife had his authority to order the goods in question; and he told them, that if the defendant had so conducted himself, he was in point of law liable, notwithstanding that he might not in point of fact have authorized her to do so. The jury, under this direction, found a verdict for the price of the goods, 12*l.* 7*s.*

Godson, in the early part of this term, obtained a rule nisi for a new trial, on the ground of misdirection; and on the last day of the term,

Gunning shewed cause. The direction of the under-sheriff was quite correct. It is not necessary in cases of this sort that direct evidence of authority in the particular transaction should be given. In *Todd v. Robinson*^(a) it appeared that the defendant, a tradesman in Yorkshire, had in several instances employed one *Womac*, who resided in London, as his agent, to order goods to be sent to him by the plaintiffs (wholesale dealers in London) on credit. Six parcels so ordered were received and paid for by the defendant. *Womac* afterwards, in the defendant's name but without his authority, ordered other goods of the plaintiffs to be sent by the usual conveyance, and intercepted them for his own use. The action being brought to recover the price, the defendant denied his liability, but under the direction of *Abbott*, C. J. the plaintiff had a verdict. His lordship's language, in addressing the jury, was as follows:—"The liability of the defendant depends on the

(a) *Ryan & Moody*, N. P. C. 217.

question, whether the defendant has by his own acts or conduct constituted *Womac* his general agent to order goods. The authority actually given in each particular instance to *Womac*, can (may) only be known to the defendant himself (and *Womac*). The plaintiffs can only look to the *appearances* held out by him; and it is for you to say whether the defendant, by his own act and conduct, had induced the plaintiffs to believe that *Womac* was his agent for the purpose of ordering these goods. If you think he has so authorized the plaintiffs to treat *Womac* as his agent, then the defendant is answerable, notwithstanding he may in this particular instance have given *Womac* no such instructions." In *Gilman v. Robinson* (a), in which the same question arose upon a similar state of facts, to an action brought by another party against the same defendant, *Best*, C. J. ruled in the same way as *Abbott*, C. J. in the last-mentioned case.

The language used by the under-sheriff in this case was in effect the same as that of *Abbott*, C. J. in *Todd v. Robinson*. *Neal v. Erving* (b). A wife may be presumed to be servant or agent to her husband, as well as any other person. It was not objected at the trial that there was no case to go to the jury, nor was there any motion for a nonsuit, and the amount of the verdict is such that the Court will not grant a new trial, on the ground that the verdict is against the evidence. [Lord *Denman*, C. J. We certainly should not interfere on that ground. The only question must be, whether there was any evidence to go to the jury.]

Godson, contra. From what is said in 1 *Starkie on Evidence* (c), and the cases there referred to, it would appear that *authority* in one person to order goods for another on credit, is not to be inferred from the adoption of a *single* order, but from *general* employment,—from habit,—and from

(a) *Ryan & Moody*, N. P. C. 236.

(b) 1 *Esp.* N. P. C. 61.

(c) Second edition, p. 32.

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the course of dealing. Here there is but a single instance in which the defendant adopted the act of his wife, and this, it is submitted, was not evidence proper to be left to the jury at all. It is a strong circumstance also here, that the goods were ordered to be sent to the house of a third party, not of the defendant. The notice given by the defendant in November, 1834, not to trust his wife, was not evidence of a previous authority to order goods other than necessities, though it appeared to be considered such at the trial. The question was, whether there was evidence of agency *at the time of giving the order*. There was no evidence whatever of any conduct on the part of the defendant to lead the plaintiff to suppose that he might trust the wife on the occasion of the second order.

Lord DENMAN, C.J.—The defendant's counsel should have insisted on his right to a nonsuit, and then the question would have come more properly before us. I think, however, that there was evidence of some circumstances bearing upon the question of agency, which were more fit for the jury than for the under-sheriff.

The other Judges concurred.

Rule discharged (a).

(a) As to the evidence of assent which shall render the husband liable for the price of goods ordered by the wife, see *Montague v. Benedict* (*Benedick*), 3 Barn. & Cress. 631; *Montague v. Baron*, 5 Dowl. & Ryl. 532; *Montague v.*

Espinasse, 1 Car. & Pay. 356, 502; *Seaton v. Benedict*, 5 Bing. 28, and 2 Moore & Pay. 66; *Hunt v. De Blaquiere*, 5 Bing. 550, and 3 Moore & Pay. 108; *Clifford v. Laton*, Mood. & Malk. 101, and 3 Car. & Pay. 15.

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MOREAU v. HICKS.

INDEBITATUS assumpsit. The particulars of demand were as follows:—

	£	s.	d.
Attendance to instruct in drawing	12	12	0
Miniature portrait delivered	5	5	0
Drawing materials	0	4	0
	18	1	0
Received at sundry times	4	19	6
	13	1	6

Plea: set-off for board, &c.

The jury found that 2*l.* 2*s.* instead of 12*l.* 12*s.* was sufficient for the instruction in drawing, and, deducting the money paid, (4*l.* 19*s.* 6*d.*) returned a verdict for the plaintiff for 2*l.* 11*s.* 6*d.* The money (4*l.* 19*s.* 6*d.*) paid on account, was paid before the miniature portrait mentioned in the particular had been completed. By the Blackheath Court of Requests Act (*a*), the jurisdiction of the Court is not to extend to “any debt for any sum, being the balance of an account on demand, originally exceeding 5*l.*”

Platt having obtained a rule nisi for entering a suggestion on the record for the purpose of depriving the plaintiff of his costs, upon an affidavit stating the above facts, and also that the defendant *resides* at Lewisham, within the jurisdiction of the Blackheath Court of Requests,

Theobald now shewed cause. I. This action was brought to recover *the balance of an account*, and is clearly within the exception in the act. *Fountain v. Young* (*b*) arose on the Southwark Court of Requests Act (*c*), which contains an exception similar in its terms, and shews that

In an affidavit to ground a motion to deprive a plaintiff of his costs, on the ground that the subject-matter of the action was cognizable in a certain Court of Requests, a statement that the defendant *resides* at a place within the jurisdiction of the Court of Requests, without stating that he *resided* at the time of the action brought, is insufficient.

Semble, that an action may be said to be brought for the balance of an account originally exceeding 5*l.*, where the aggregate amount of the items out of which the balance arose exceeds 5*l.* although at no one time was 5*l.* due.

(*a*) 47 Geo. 3, sess. 1, cap. iv.

(*c*) 46 Geo. 3, cap. lxxxvii.

(*b*) 1 Taunt. 60.

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the plaintiff's demand is to be considered as the balance of an account originally exceeding 5*l.*

II. Before the defendant can claim the privilege of the act, he must shew that he was resident within the jurisdiction of the Court at the time when the action was brought. All that the affidavit shews is that he *now* resides at Lewisham, within the jurisdiction. That is not sufficient.

Platt in support of the rule. This was not the case of a *balance* but of *set-off*. [*Coleridge, J.* referred to *Clark v. Askew* (a)] The plaintiff's demand never amounted to more than 5*l.*, inasmuch as the payments were made before his right of action in respect of the portrait accrued, and the jury have found, specially, that 2*l.* 2*s.* was all that the plaintiff was entitled to for tuition in drawing. [*Little-dale, J.* Suppose a party sells successive parcels of goods, and there are various payments of cash from time to time, would not the difference be the *balance of an account* (b)? *Coleridge, J.* In *Fountain v. Young* (c), the affidavit states that the defendant, *at the time of commencing the action*, was and still is resident within the jurisdiction.]

Lord DENMAN, C. J.—We think the affidavit insufficient.

Rule discharged, without costs.

(a) 8 East, 28.

8 Dowl. & Ryl. 155.

(b) And see *Chadwick v. Bunting*, 5 Barn. & Cress. 532; S. C.

(c) 1 Taunt. 60.

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The KING v. GIBBS CRAWFORD ANTROBUS, Esq.

Trial at Bar, 13th February, 1835.

Before Lord Denman, C. J., Littledale, J., Patteson, J., and Williams, J.

INFORMATION, filed in Michaelmas term, 1834, by the then Attorney-General (*Campbell*). The first count stated that at the assizes and general gaol-delivery, held at the city of Chester on 6th August, 1834, for the county of Chester, before *Vaughan, J.* and *Parke, B.* justices, &c., *James Garside* and *Joseph Mosley* were indicted for the murder of *Thomas Ashton*; (reciting the indictment at length:—that at the same assizes and before the said justices, to wit, on the said 6th August, 1834, came *Garside* and *Mosley* under the custody of *John Dunstan*, constable of the Castle of

A sheriff is not bound, upon service of a copy of the calendar of prisoners, signed by a justice of gaol delivery at the assizes, to execute prisoners against whom the sentence of death has been passed,

unless such prisoners are in his legal custody.

Therefore, where a county gaol and the custody of the prisoners in such gaol belonged to a patent officer, independent of the sheriff, it was held that the sheriff was not legally bound, upon receiving the calendar, to demand to have the prisoner delivered to him by such patent officer, for the purpose of executing him.

In such case, in order to make the liability of the sheriff complete, the Court in which the prisoner is condemned, should, by a writ of *habeas corpus* or other mandate, require the patent officer to deliver the prisoner to the sheriff, and should by another writ or mandate require the sheriff to receive and execute him.

Whether a *special order* of the Court to the patent officer and the sheriff (they being both bound to be present in Court) would be sufficient, *quære*.

Mere notice of the sentence, and of the liability of the sheriff to execute, is not sufficient to warrant the patent officer to deliver the prisoner to the sheriff for execution.

Where the sheriff has the custody of the prisoner, the judgment of the Court passing sentence of death upon him, is, without any warrant or copy of the calendar, sufficient to authorize and require the sheriff to do execution; the copy of the calendar, signed by the judge, is a mere *memorial*.

Evidence of *reputation* is not admissible upon a question whether, by custom, the sheriff of a county or of a city is bound to do execution upon criminals condemned to death by a judge of gaol delivery, at the assizes for the county.

Upon an information against a sheriff, for refusing to execute prisoners upon whom sentence of death has been passed by justices of gaol delivery sitting in his county, evidence was received for the Crown of an order of the Court of Gaol-delivery, requiring a former sheriff to hang a criminal in chains, and an examined copy of the cravings of that sheriff, filed in the Exchequer, wherein he craves to be allowed his expenses of gibbeting such criminal, which expenses were allowed by the then Chancellor of the Exchequer.

Whether, upon a question as to the liability of the mayor and citizens of an incorporated city to perform a certain public duty, declarations of deceased citizens in favour of the existence of such liability, are admissible in evidence, *quære*.

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Chester, in the county aforesaid, in whose custody in the gaol of the county aforesaid, for the cause aforesaid, they had severally been committed, and being brought to the bar in person by the said constable, to whom they were then also committed, and forthwith being demanded, &c. severally pleaded *not guilty*, and put themselves on the country, &c. The information then went on to state the various steps in the trial of the prisoners, and their conviction; and the order and judgment of the Court—that the prisoners should be taken thence to the prison whence they came, and that they should be taken thence to a place of execution on Friday next, 8th August, 1834, and hanged; and that their bodies should be buried within the precincts of the said prison, or of any prison in which they should be confined after the conviction; *prout patet per recordum*. That the defendant, before and at and after the said conviction and judgment, was and still is *sheriff of the county of Chester*, and that it was the duty of the defendant as such sheriff, by virtue of his said office of sheriff of the county of Chester aforesaid, to execute the said judgment and sentence of death upon the said *Garside* and *Mosley*, according to law; of all which premises the defendant, being such sheriff, then and there, to wit, on 7th August, 1834, to wit, at &c. had notice. That the defendant was afterwards, to wit, on the said 8th August, 1834, duly required, as such sheriff as aforesaid, to execute the said sentence, but that he wrongfully, &c. neglecting his duty as such sheriff, wholly refused and neglected, notwithstanding he was so required as aforesaid to execute the said sentence, on the said 8th August, or at any other time, and hath hitherto wholly neglected and refused so to do. There were other counts, which it is not necessary further to mention. Plea: not guilty.

Pollock, A. G., opened the case for the Crown. This proceeding has been instituted for the purpose of ascertaining whether it is the duty of the sheriff of the county of

Chester to execute criminals tried and condemned before the judges of oyer and terminer and gaol-delivery for that county. By the common law, it is the duty of *every* sheriff to do so; but the county of Chester stands in a peculiar position. Until the late act of 11 *Geo. 4* & 1 *Will. 4*, c. 70, Cheshire, being a county palatine, had a peculiar jurisdiction of its own. By that act, s. 14, all the palatinate courts were abolished, and the county of Chester was put upon the same footing, as regards commissions of assize and oyer and terminer, as every other county not a county palatine. By the 15th section, however, it is provided "that nothing in this act contained shall be construed to abolish or affect the obligations and duties, or the jurisdictions or rights now lawfully imposed upon, performed, or claimed and exercised, by the mayor and citizens of Chester, in the courts of the county of the city of Chester, *or otherwise*, save and except as to writs of error." On the part of the defendant it will, no doubt, be urged, that before the passing of this act the obligation or duty of executing the sentence upon criminals of the county of Chester was lawfully imposed upon the mayor and citizens of the city of Chester, and that the words of this section are sufficient to preserve that obligation or duty. These words cannot, however, be sufficient to preserve the liability of the mayor and citizens of Chester, or their officer, to execute the sentences or obey the orders of any courts superior to "the courts in the county of the city of Chester," unless the words "*or otherwise*" are allowed to have that effect. This, it is apprehended, they cannot have. Such words are not sufficient to control the previous enacting clause, by which the county of Chester is put upon the same footing as to commissions of oyer and terminer as other counties. But, supposing that the duties and obligations of the city authorities are preserved as respects the courts of superior jurisdiction, the question remains, whether the duty of executing the sentences of the Court of Great Sessions of the County Palatine of Chester was im-

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posed exclusively upon the sheriffs of the city. Undoubtedly, from as far back as *living memory extends*, the sentences of the Court of Great Sessions have been carried into execution by the city sheriffs, but this was always done by virtue of special orders of the judges of that court, who undoubtedly had jurisdiction over the city as well as the county of Chester. When, however, that Court has ordered a criminal to be hanged in chains in distant parts of the county, the duty of executing this part of the sentence of the criminal has been performed by the sheriff of the *county*, in obedience to an order of the Court.

Evidence for
 the prosecu-
 tion.

The record of the conviction of *Garside* and *Mosley* for the murder of Mr. *Thomas Ashton*, removed into this Court by *certiorari*, was read by the officer of the Court.

Mr. *Lloyd*, clerk of assize for the Chester circuit, stated that he was present at the trial of *Garside* and *Mosley*, before *Parke*, B.; that the defendant was present in his character of sheriff; that a copy of the calendar, signed by the learned judge, was received by the witness, who afterwards served a copy of it on the defendant; that the defendant gave him a letter for the judge, who, on reading it, granted a respite (*a*). The letter was then put in and read. In it the defendant declined to execute the sentence on *Garside* and *Mosley*, on the ground that he had doubts as to whether he should be justified in doing so.

Mr. *Lloyd*, on cross-examination, stated that the prisoners were brought up in the custody of the constable of the Castle of Chester,—remained in his custody during the trial,—and were after the trial taken back by him to the castle: that the city and the county gaols were both within the Castle of Chester, which, though locally within the city, was, by reason of an exception (*b*) in the charter of the city, a part of the *county* of Chester: that all prisoners in

(*a*) See the statement of the further proceedings against the prisoners, *ante*, 33.

(*b*) By reason of a similar ex-

ception, the castle of Exeter, though surrounded by the county of the city of Exeter, remains part of the county of Devon.

the castle are in the custody of the constable, who is a patent officer, appointed by the Crown, and independent of the sheriff: that previously to the serving of the copy of the calendar on the defendant, an order of the Court for the execution of the prisoners, addressed to the sheriffs of the city of Chester and to the constable of the castle, had been served on them respectively; but they had declined to execute the sentence: that he had known the city for forty years, and that during that time criminals had always been executed by the *city* sheriffs, within the city, in pursuance of a warrant addressed to the city sheriffs and the constable of the castle.

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Maule, for the defendant, then proposed to ask the witness, whether he had not heard old people of the city of Chester say that they understood that it was not the duty of the sheriff of the *county* to execute criminals tried and sentenced at the castle. Reputation.

LORD DENMAN, C. J.—I do not think that this is a question upon which evidence of reputation can be received.

Maule, *F. Kelly*, and *Welsby* argued, that as the question was one which related to public justice, it was properly matter of reputation; and they referred to *Morewood v. Wood* (a), in which Lord *Kenyon*, C. J., said, “Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information.”

Pollock, A. G., argued *contra*; and was stopped by the Court.

(a) 14 East, 329, n.

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LORD DENMAN, C. J.—I am of opinion that evidence of reputation upon this subject cannot be received. The principle upon which such evidence is ever received is, that the subject-matter of it is of such a nature that the *public at large* are interested in it. Now, though this is, in *one* sense, a matter of a *public* nature, and with which the public might be supposed to be *conversant*, yet it is not a matter in which they are *interested*; for it cannot be material to them whether one officer or another executes the sentences of their courts of justice.

LITLEDALE, J.—This is a question of *private right*, not of *public interest*; and does not fall within the rule as it is laid down by Lord *Kenyon*.

PATTESON, J.—I do not think that this is a question of *public right*. It is more like a question whether one person is liable *ratione tenuræ* to discharge a public duty, which by the general law of the land is cast upon another. Evidence of reputation is never received upon questions of that nature.

WILLIAMS, J.—I am of the same opinion. In a case before *Chambre, J.*, in which a question arose concerning the boundaries of the borough of Wem, he ruled that though evidence of reputation as to the *boundaries* might be received, such evidence as to the *particular spot* on which an old turnpike had stood, could not be admitted.

Maule then proposed to ask the witness, whether he had not heard old people *in the city of Chester* say, that the corporation of Chester were bound to execute criminals sentenced by the Court of Great Sessions.

LORD DENMAN, C. J.—I think that the last question falls within the same rule as the one which we have already rejected.

PATTESON, J.—There is no issue upon the liability of the corporation. If there had been such, this evidence, which is of a matter somewhat in the nature of an admission, might possibly have been received. I quite agree that it cannot be received in this case.

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Pollock, A. G., proposed to put in an order of the Court of Great Sessions in 1790, directing the sheriffs of the city of Chester to execute *John Dean*, and the sheriff of the county to hang him in chains on Stockport Moor; and also an examined copy of a bill of cravings^(a), filed in the Exchequer, in which *John Arden*, Esq., the then sheriff of Cheshire, prayed to be allowed the expenses of gibbetting *John Dean* on Stockport Moor, amounting to 84*l.* 8*s.* 3*d.*, which was allowed to him accordingly by Mr. *Pitt*, the then Chancellor of the Exchequer.

Order of execution by Great Sessions.

Bill of cravings.

Maule and *Kelly* objected to these pieces of evidence, and argued that they could not be received unless the record of the conviction of, and the judgment upon *John Dean*, were first put in.

Pollock, A. G., and Sir *John Campbell* contended that the evidence was receivable, for the purpose of shewing that an order had been made, by the Court of Great Sessions, upon the sheriff of Cheshire, which he had obeyed; that the bill of cravings and allowance was a judicial proceeding in the Exchequer, which was of record, and might be pleaded with a prout patet per recordum.

PER CURIAM.—We think that these documents may be read. The order is receivable, as shewing that the Court made such an order. The bill of cravings is evidence of an act done by a former sheriff, and is therefore evidence against the defendant upon the present inquiry.

(a) *Vide* Mann. Exch. Pract. 2d ed. 324 (f).

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The order and bill of cravings were read.

The order served by Mr. *Lloyd* upon the constable of the castle of Chester and the sheriffs of the city of Chester, was also read. It was addressed thus—"To the Constable of the Castle of Chester;—To the Sheriffs of the City of Chester;—And all others whom it may concern:"—and after reciting that *Garside* and *Mosley* had received sentence of death for murder, it was thereby ordered and adjudged that execution of the said sentence should be done upon them on Friday, the 8th day of August, at the usual place of execution; and that the sheriffs of the city of Chester should see that execution was done in the premises, and that their bodies immediately afterwards, when dead, should be delivered into the custody of the constable of the said castle, and that the said constable should cause the said bodies to be buried within the precincts of the said castle or gaol of the county of Chester, according to law.

The case for the prosecution being closed,—

Objections on the part of the defendant.

First point:
 Impossibility of performance of alleged duty.

Maule, *Kelly* and *Welsby* submitted that the charge against the defendant, contained in the information, was not supported by the evidence. The *judgment*, as it is stated in the information, and which, it is alleged, it was the duty of the defendant to execute, is one entire indivisible thing. Now it is clear upon the evidence, that whatever may have been the duty of the defendant as regards the mere execution, he had not the *power* of taking the prisoners back from the court to the prison from whence they came,—to take them thence to a place of execution,—or to bury them within the precincts of the prison;—for the prisoners were in the custody of an officer entirely independent of the sheriff, and the prison whence they came was not the prison of the defendant.

Second point:
 No sufficient warrant.

But, further, supposing that it was in fact the duty of the defendant to have executed the prisoners if properly required so to do, the service of the copy of the calendar was not a

sufficient *warrant* to him, nor did it indeed give him the *power* of executing the prisoners. Undoubtedly, it is the usual course merely to serve a copy of the calendar upon the sheriff, and this is considered a sufficient warrant to him; but that is because ordinarily the prisoner, the sentence upon whom the sheriff is required to execute, is already *in his custody*. The duty of executing sentences upon prisoners is incident to the *custody* of them, and inasmuch as the county gaol is ordinarily the prison of the *sheriff*, therefore it is that the duty of executing criminals devolves upon him. Lord *Hale* says (a), "If the prisoner *be in the custody of the sheriff*, the truth is that there is *no need of any warrant or calendar*; for the open pronouncing and entering of the judgment—*suspendatur*—is a warrant for the execution: And so it is in the King's Bench, the entry on the record of the judgment, with a *præceptum est marescallo quod faciat executionem, periculo incumbente*, without formal writ or precept of the court, is sufficient, and more is not usual: And the calendar subscribed by the judge of gaol delivery is but a *memorial*." Lord *Hale* further says, that "regularly the officer that is to make the execution is that officer in whose custody by law the prisoner is, at the time of the judgment given; for into his custody he is to be remanded after judgment pronounced, and there to stay till judgment executed. *Therefore*, where judgment is given at the sessions of gaol delivery, the execution is to be made by the sheriff, or his under-sheriff or deputy, for regularly he is in his custody ordinarily; but *if the prisoner be in the Tower of London*, and he be arraigned before justices of oyer and terminer, he is commonly brought before them by a precept to the Constable of the Tower (*which is an exempt prison from that of the sheriff*); and if he be convict and attain, he is commonly remitted thither, and the precept or warrant for the execution must go to the *Lieutenant or Constable of the Tower*." And he further puts the instance of prisoners tried for treason or felony in the King's

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(a) 2 Hale's P. C. 51.

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Bench, in which case the Marshal, because regularly he has the *custody* of the prisoner, is bound to do execution upon him if he be convict and attaint, and not the sheriff. In the former of these cases, however, it is usually ordered that the sheriffs of London and Middlesex, and in the latter, and other like cases, the sheriff of the county where the execution is made, should *assist* at the execution. Assuming, in this case, that it was the duty of the defendant, as sheriff of Cheshire, to do execution upon *Garside* and *Mosley*, there ought to have been a special warrant to the constable of the castle to deliver the prisoners to the defendant, and another to the defendant to do execution upon them when in his custody. This course was formerly pursued in the city of Chester itself. [*Little-dale, J.* The proper course would have been to issue a *habeas corpus* to the constable to deliver up the prisoners, and to the sheriff to receive them. But it certainly may be done by *warrant*.] The service of the calendar, which, as *Lord Hale* says, "is but a *memorial*," could not be sufficient for the purpose of enabling the defendant to do execution upon these prisoners. In *Earl Ferrers's* case, there was a writ to the lieutenant of the Tower (in whose custody the earl then was) to deliver the prisoner at the gate of the Tower to the sheriffs of London and the sheriff of Middlesex, and another writ to the sheriffs of London and the sheriff of Middlesex, commanding them at a certain day and hour, without the gate of the Tower, to receive the earl into their custody, and him, *in their custody so being*, to convey to the accustomed place of execution at Tyburn, and then to cause execution to be done on the earl, in their custody so being, according to the judgment (*a*). Supposing, however, that it be said that the defendant, having *notice* of the judgment, was bound to go to the constable and demand to have the prisoners delivered up to him; the answer is, that the *constable* would not have been authorized to *deliver* them up, if such demand had been formally

(a) See the writ, 4 Bla. Com. Appendix.

made, for already an order had been served upon him, in which it is ordered, that execution should be done by the city sheriffs. Moreover, even if such order had not been served upon the constable, he would not have been authorized in delivering up the prisoners upon merely being shewn the copy of the calendar.

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Pollock, A. G., Sir J. Campbell, and Wightman, contra.

I. The allegation in the information, that it was the defendant's duty to execute "the said judgment and sentence of death" is divisible, and it is sufficient to shew that it was the defendant's duty to execute "the sentence of death," and to prove a breach of that duty.

II. It was not necessary to shew that a special warrant or a habeas corpus issued to the constable to deliver the prisoners to the sheriff of Cheshire, and to the sheriff of Cheshire to receive them. The act of parliament (a), by which the palatinate jurisdiction of Cheshire was abolished, has thrown upon the sheriff of Cheshire the duty of executing criminals according to the course of the common law; therefore, upon the copy of the calendar being served upon the defendant, it was his duty to go to the constable of the castle of Chester, and demand the prisoners, and it was the duty also of the constable to deliver them to the defendant, as being the officer legally bound to do execution upon them. The defendant, instead of demanding the prisoners, or objecting that he had no sufficient warrant, at once refuses to do execution upon them, on the ground that it was not his duty so to do. If, instead of so refusing, he had demanded the prisoners, and the constable had refused to deliver them, that would have been matter of *excuse*, but nothing more. It cannot be taken that the constable *would* have so refused. Notwithstanding the service of the order of *Parke, B.*, the constable would have been *bound*, upon demand, to deliver the prisoners to the defendant. It is to be ob-

(a) 11 *Geo. 4.*, and 1 *Wm. 4.*, c. 70.

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served, that this order does not direct the constable to deliver to the custody of the sheriff, but, as far as he is concerned, merely *gives notice* of the conviction and sentence of the prisoners. But supposing it to be tantamount to an order to deliver to the city sheriffs, still it is a nullity, and cannot therefore affect the present prosecution. With regard to the operation of the calendar, it is tantamount to a warrant. Anciently a *warrant* was required in all cases, but for centuries a copy of the calendar, signed by the judge, has been deemed sufficient. Sir *William Blackstone* (a) treats the calendar with the judgment of the prisoner in the margin as being in fact a *warrant* to the sheriff to do execution. No warrant, however, of any kind was necessary. The sheriff and the constable were both in Court at the time when the sentence was passed, and were, therefore, each of them bound, without warrant, to do that which belonged to them to do towards executing the sentence. Lord *Hale* does not say that, where the prisoner is in the custody of the sheriff, the calendar is a sufficient warrant; but that in such case *no* warrant is required; and he mentions that Lord *Rolle* never would sign a calendar, but always passed sentence *vivâ voce*. It would rather seem, from what Lord *Hale* says, that the calendar would be a sufficient warrant where the prisoners were *not* in his custody.

Maule was heard in reply.

Judgment.

LORD DENMAN, C. J.—We are not in a situation to decide the question, which it was the object of this information to raise and settle. Two objections have been raised by the counsel for the defendant; but, as we think the second objection fatal, it is not necessary to discuss the first, although it certainly affords a strong illustration of the second. That second objection is, that the defendant *could* not do execution upon the prisoners, because he had

Second objection fatal.

(a) 4 Bla. Com. c. 32.

not the *custody* of them, nor had any *legal means* of obtaining such custody. The principle contained in this objection is clearly established by the authorities. But then comes the question,—*had* the defendant the custody of the prisoners or legal means of obtaining it? The former, it is clear, that he had not, for the prisoners were in the custody of the constable of the castle of Chester, who is a patent officer *independent* of the sheriff. The latter, also, I think that he had not. The defendant had the copy of the calendar delivered to him, but I should greatly doubt whether, under any circumstances, that would be a sufficient warrant for the constable to act upon; and certainly I do not think that the defendant was *bound* to accept it as a warrant to execute. Suppose that the defendant had accepted it, and had gone to the constable to demand to have the prisoners delivered to him, in what a situation would he have been placed if the constable had shewn him the order addressed to himself and the sheriffs of the city, and requiring the *latter* to do execution upon the prisoners? It is true, as it has been contended to-day, that the defendant did not *put* his refusal upon the want of a sufficient authority: but still I think that, in order to support this information, it ought to be shewn, on the part of the crown, that the defendant was armed with full authority to act if he had thought proper to do so.

LITLEDALE, J.—The question as to the liability of the sheriff of Cheshire to execute criminals tried and condemned within the county, arises under very peculiar circumstances, and it will probably be difficult to say what his liability is. However, as the case now stands, we may put the general point out of consideration, and treat the question, whether the defendant is chargeable *upon this information*, as if he were in the same situation as ordinary sheriffs, with this exception only, that the prisoners whom he is called upon to execute, are in the custody of an independent officer. The prisoners were brought up to the

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bar of the Court in the custody of the constable of Chester, and by law ought to be taken back by him to the place whence they came. This, we gather from Sir *Matthew Hale*, where we also find it laid down, and correctly so, that the sheriff of the county, *or other person having the legal custody of the prisoners*, is the party upon whom the duty of doing execution upon them is cast. It is not necessary now to consider whether, in this case, the constable of the castle of Chester is the person who ought to perform that duty. *This* is clear, that the liability of the sheriff of Cheshire could not commence until he had obtained the *custody* of the prisoners, or a legal warrant for the delivery of them to him. If this duty properly belonged to the defendant, there should have been a *habeas corpus* to the constable of the castle to bring up the prisoners, and a warrant or writ to the defendant to receive them; or, perhaps, as the constable of the castle and the defendant were both bound to be present in Court, a *special order* might have been made by the judge, requiring the one to deliver, and the other to receive and execute, the prisoners. Now, what has been done here? A *copy of the calendar* has been delivered to the defendant, and an *order* has been served on the constable of the castle. The order so served on the constable, instead of requiring him to deliver the prisoners to the defendant, gives him notice that, by the same order, the *sheriffs of the city* are required to execute the prisoners. But, supposing that this order may be treated as a nullity, (as the counsel for the crown contend) still I do not think that the *calendar* was sufficient to enable the defendant to call on the constable to deliver up the prisoners. The defendant might, it is true, have demanded them, but the constable was not bound to give them up. The defendant and the constable had both *notice* of the judgment of the Court, for they were both bound to be present in Court, and the defendant had also a copy of the calendar delivered to him; but, if the custody of the prisoners was intended to be changed, there should have been a *special order* of

the Court for the purpose. As, therefore, the defendant had not the *power* of carrying this sentence into effect, his refusal to do so was not criminal. The case of the Tower of London is very similar to this.

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PATTESON, J.—There is great doubt as to whether the sheriff of Cheshire is bound to execute or not; but it may be assumed, that the situation of this sheriff is the same as that of any other sheriff. It appears clearly from Lord *Hale*, that the person in whose custody the prisoners are, is *primâ facie*, at least, the person whose duty it is to execute them. The defendant *had not* the custody of the prisoners, therefore the question is, whether a sheriff is bound to do execution upon prisoners within his county but in the custody of another party. Where the sheriff has the custody of the prisoners, he is bound to execute without any document. The calendar, which it has long been the practice to serve on the sheriff, is a mere *memorial*, as Lord *Hale* says, and nothing more. Then, is there any authority for saying that a sheriff is legally bound, without any warrant or other mandate in writing, to execute prisoners *not in his custody*? This case very closely resembles that of the Tower, which is put by Lord *Hale*, in which case it is considered necessary to have two writs or warrants, one to the lieutenant of the Tower to deliver to the sheriffs, and the other to the sheriffs to receive from the lieutenant. It may be that the constable of the castle of Chester ought to execute, and the sheriff of Cheshire to *assist*; but I do not say that the sheriff might not be ordered by the judges of gaol delivery to *execute*. This, however, is certain that he cannot be required to do so, unless he has the prisoners *in his custody* or is provided with the means of *obtaining the custody*.

WILLIAMS, J.—It appears by the record of conviction of the prisoners below, as well as by the evidence, that the prisoners were not in the defendant's custody; when the prisoners were brought up into this Court that we might

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award execution upon them, the writ of *habeas corpora* was directed to the constable of the castle. Now, is there any case in which a person has ever been called upon to do execution upon prisoners who were not in his *legal custody*? The cases, as well those referred to to-day as those cited on a former occasion before us (*a*), shew that the party who is called upon to do execution must have the *legal custody*. Now, here the defendant had not the legal custody, nor was he furnished with any thing which gave him the right to require that the prisoners should be delivered to him. The calendar is a *mere memorial*, and has no other operation than that of a mere memorial.

Lord DENMAN, C. J. directed the jury to acquit the defendant.

Verdict—Not guilty (*b*).

(*a*) *Rex v. Garside and Moseley*, ante, 33.

(*b*) *F. Kelly* had, on behalf of the sheriff of the county of Chester, moved, in Hilary term, for a rule nisi for a mandamus to the Mayor and Burgesses of Chester, commanding them to allow an inspection, for the purposes of this trial, of certain documents belonging to them and in their custody. The Court refused the rule, on the ground that the party on whose behalf the application was made was not a member of the corporate body, and that a corporation could not be compelled to produce their own documents for the purpose of furnishing evidence against themselves. And see *Rex v. Dr. Purnell*, 1 Wils. 239; *Hodges v. Atkis*, 2 W. Bla. 877, and 3 Wils. 398; *Rex v. Bridgeman*, 2 Stra. 1203; *Rex v. The Fraternity of Hostmen in Newcastle-upon-Tyne*, ibid. 1223; *Brewers' Company v. Benson*, Barnes, 236; *Mayor of*

Exeter v. Coleman, ibid. 238; *Wood v. Whitcomb*, 12 Vin. Abr. 146, pl. 9; *Cox v. Copping*, 5 Mod. 396, and 1 Lord Raym. 337; *Rex v. Worsenham*, 1 Lord Raym. 705; *Regina v. Mead*, 2 Lord Raym. 927; *Talbot v. Villebois*, 3 T. R. 142, cited; *Southampton, Mayor of, v. Greaves*, 8 T. R. 590; *May v. Gwynne*, 4 Barn. & Ald. 301; *Harrison v. Williams*, 4 Dowl. & Ryl. 820, and 3 Barn. & Cressw. 162; *Willis v. Farrer*, 2 Younge & Jerv. 217; *Newell v. Simpkin*, 6 Bingh. 565, and 4 Moore & Payne, 394; *Imperial Gas Company v. Clarke*, 7 Bingh. 95, and 4 M. & P. 727; *Hewitt v. Pigott*, 7 Bingh. 400, and 5 M. & P. 252; *Rex v. Justices of Buckinghamshire*, 2 Mann. & Ryl. 412, and 8 Barn. & Cressw. 375; *Rex v. Master and Wardens of Merchant Tailors Company*, 2 Barn. & Adol. 115; Tancred on Quo Warranto, 336, 339; 2 Stark. Evid. 2d ed. 694.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE FIFTH YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDA.

IN the course of last vacation His Majesty was pleased to appoint *Robert Alexander* and *Thomas Starkie*, of Lincoln's Inn, Esquires, his Counsel learned in the law.

Shortly after the commencement of the term, Lord *Lyndhurst* resigned the office of Lord Chancellor of Great Britain; and the Great Seal was delivered to Sir *Charles Christopher Pepys*, Knt. Master of the Rolls, Sir *Launcelot Shadwell*, Knt. Vice-Chancellor of England, and Sir *John Bernard Bosanquet*, Knt. one of the Justices of the Common Pleas,—as Lords Commissioners for executing the office of Lord Chancellor of Great Britain.

Sir *Edward B. Sugden* resigned the office of Lord Chancellor of Ireland, and was succeeded by Lord *Plunkett*.

Sir *Frederick Pollock*, Knt. and Sir *William Webb Follett*, Knt. resigned their respective offices of Attorney and Solicitor-General, and were succeeded by Sir *John Campbell*, Knt. and *Robert Mounsey Rolfe*, Esq., who shortly afterwards received the honour of knighthood.

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Ex parte WILLIAM HENRY CARMICHAEL SMYTH.

The Lords of the Privy Council cannot be required by mandamus to rehear the matter of an appeal to them from the Arches Court of Canterbury, upon which they have decided; nor can they be so required to receive a petition to his Majesty in council to rehear.

KENNEDY moved for a rule to shew cause why a mandamus should not issue to the Lords of the Privy Council, commanding them to receive a certain petition of *William Henry Carmichael Smyth*, in relation to an order made by the Judicial Committee of the Privy Council, and to lay the same before his Majesty in council. The application was grounded upon an affidavit of *W. H. C. Smyth*, in which he stated the following facts:—

A suit having been commenced in 1831 against the deponent by his wife in the Consistory Court of London, the judge of that Court decided in his favour upon a part of the case. Against this decision the wife appealed to the Arches Court of Canterbury, which Court having refused to entertain the appeal, she appealed to the High Court of Delegates, who also decided against her. Upon a second point, also, the judge of the Consistory Court made an order in favour of the deponent, which order was, upon appeal by the wife, reversed by the Arches Court. From this decision the deponent appealed to his Majesty in council, (the Judicial Committee in the Privy Council having been lately substituted by 3 & 4 W. 4, c. 41, for the Court of Delegates.) This appeal being referred to the Judicial Committee of the Privy Council, that Court gave judgment upon the matter in open Court, and agreed to submit a report of their decision to his Majesty in council. The deponent, being dissatisfied with the decision, prayed that the report might not be submitted to his Majesty for confirmation until he had had time to petition the King in council not to confirm it; which prayer was not granted. The decision of the Judicial Committee had been subsequently confirmed by his Majesty in council. A petition stating the above facts, and suggesting errors in the decision of the Judicial Committee of the Privy Council, and praying his Majesty in council to rescind the order of con-

firmation, or to direct the Judicial Committee to hear the petitioner in objection to a part of the decision, was forwarded by the deponent to the Lord President of the Privy Council, with a letter requesting that it might be submitted to his Majesty in council. The Lord President returned an answer that the petition could not be received.

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Kennedy, in support of his motion. There is manifest error in the decision of the Judicial Committee. [Lord Denman, C. J. Can you shew that we have *jurisdiction*?] There can be no doubt of the jurisdiction of this Court to interfere in the manner suggested, if they see that the order of the Judicial Committee is clearly erroneous. The Court are not asked to require the Privy Council to *re-hear*, but merely to *receive a petition* to re-hear. Whatever might be the effect of the petition when received, the matter ought not to be stopped *in limine* by a refusal to receive that petition. [*Littledale, J.* Have you any case in which the Court has granted a mandamus to the Court of Delegates, requiring them to re-hear a matter decided by them?] The only case which bears upon the question is that of *Ex parte Morgan(a)*, in which the Court certainly decided that they could not compel another Court to *re-hear* that which it has finally decided upon. The Court is not now asked to do that. [*Littledale, J.* Formerly if a party was dissatisfied with a judgment in the Court of Delegates, he might apply for a Commission of Review. The same Court was not called upon to re-consider its own decision.] It unfortunately happens, that by the act which has transferred to the Judicial Committee of the Privy Council the jurisdiction of the old Court of Delegates, it is enacted, "that every such judgment, order, and decree, shall be final and definitive, and that no commission shall hereafter be granted or authorized to review any judgment or decree to be made by virtue of this act."

(a) 2 Chit. Rep. 250.

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There is no means of correcting the error in the decisions of this Court, except by way of a re-hearing.


LORD DENMAN, C. J.—Upon the statement of the learned counsel himself, it is perfectly clear that we have no power to do what is prayed. Here is a Court of the highest authority,—at all events of competent jurisdiction to decide. They have decided, and it is not for us to call on them to re-hear and to re-decide. If we might do this, we might also call on my Lord Chancellor to revise every decree he ever made, and compel every other Court in Westminster Hall to review its decisions. I do not acknowledge any distinction in substance between a mandamus to receive a petition to re-hear, and a mandamus to re-hear.

LITTLEDALE, J.—I do not think that we have any power to compel the Court to re-hear a case decided by them.

PATTESON, J.—This is quite a novel attempt. I never heard of this Court ordering a re-hearing in any case where that case has been already heard and decided by another Court. And as to the distinction that is taken, that the application is only for a mandamus to require the Lords of the Privy Council to receive a petition to re-hear, and not for a mandamus to re-hear, that is a distinction without a difference.

Rule refused (a).

(a) And see *Ex parte Poe*, ante, vol. ii. 636.



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HENSLOW v. FAWCETT.

DEBT for a penalty of 500*l.* under 2 *Geo.* 2, c. 24, s. 7.

The declaration stated that, on the 30th December, 1834, a writ issued to the sheriff of Cambridgeshire for the election of knights of the shire, and for burgesses for the University and Borough of Cambridge; that the sheriff made his precept to the mayor of the Borough of Cambridge, for the election of two burgesses; according to which precept, afterwards, to wit, on 9th January, 1835, the election of two burgesses was had. Averment: that before and at the said election, *James Lewis Knight*, esq. was a candidate to be elected and returned to serve as one of the burgesses for the said borough in the next parliament; and that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on the 7th January, 1835, *did corrupt* one *John Garner*, who had a right to vote in the said election, to give his vote in that election for the said *J. L. Knight*, so being such candidate as aforesaid, by then corruptly giving to the said *John Garner* the sum of 5*l.*, and then corruptly promising to give him a further sum of 5*l.* after he should have so given his vote in the election for the said *J. L. Knight*; which several sums of 5*l.* and 5*l.* were then respectively given and promised by the defendant to *John Garner* as and for a reward for him so to give his vote in the said election for the said *J. L. Knight*; contrary to the form of the statute, &c. Plea: nil debet.

At the trial before Lord Abinger, C. B. at the last assizes for Cambridgeshire, *John Garner* was called by the plaintiff as a witness, and gave the following evidence:—

At half past seven, A. M. on the first day of the late election for the Borough of Cambridge, the defendant came

The penalty, imposed by the Bribery Act (2 *Geo.* 2, c. 24, s. 7,) upon persons who, by any gift or reward, &c., corrupt any person to give his vote, or to forbear to give his vote, at an election for members of parliament, may be recovered from a man who makes a corrupt agreement with a voter to give his vote to a particular candidate, and gives money to the voter in performance of his part of the agreement, although in fact the voter gives his vote to the opposite candidate.

So, even though the voter, at the time of making the corrupt agreement, actually intended not to perform it, but to vote for the opposite candidate.

A voter, who agrees or contracts for any money or other reward, to give, or forbear to give his vote at an election, is liable to the penalties of 2 *Geo.* 2, c. 24, s. 7, though he never intended to perform the corrupt agreement.

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to him, and, after some preliminary conversation, asked him whether he would give Mr. *Knight* a vote; to which he replied, that it depended upon circumstances. The following dialogue then took place between them:—"I see you and I can do business—Have you any bills to pay?" "I do not know that I have just now, but the article is very useful." "Is 5*l.* of any use to you?" "Come, don't be worse to me than you are to my neighbours." "I will give you 10*l.*, 5*l.* now, and 5*l.* after you have polled." The defendant then gave the witness five sovereigns, adding, "You will go and poll for Mr. *Knight*." The witness took the five sovereigns, saying, "We are level handed now, I have got 5*l.* and you have got 5*l.*" The defendant asked the witness when he would like to poll. The witness told him eight o'clock; upon which the defendant promised to come for him at eight o'clock, and left the witness's shop. The defendant came back in about a minute, saying, that he had forgotten that they did not poll that morning until nine o'clock; to which witness replied, "Very well, Sir." A friend of the witness's came into his shop about a minute after the defendant had left it, and the defendant shewed him the sovereigns. He almost immediately afterwards shewed them to another friend, and in about half an hour afterwards he went to Mr. *Spring Rice*'s committee, and shewed the sovereigns there. He did not return to his shop until after he had polled (as he had done on two previous elections) for Mr. *Spring Rice* and Mr. *Pryme*. This evidence was left to the jury by the Lord Chief Baron, with a question as to the *credibility* of the witness; and the jury found a verdict for the plaintiff, damages 500*l.*

Storks, Serjt. now moved for a new trial. The only count contained in the declaration in this case is, for *corrupting* a voter to give his vote for a certain candidate; and it states, that the defendant *did corrupt* one *John Garner*. This count was not supported by the evidence, for it clearly appeared that *Garner* at no moment *intended* to give his

vote for the candidate, to induce him to vote for whom the defendant gave the 5*l*. The offence of "*corrupting*" was not complete. The seventh section of 2 *Geo. 2*, c. 24, upon which this action is founded, enacts, "that if any person who has or claims to have any right to vote at any election of any member to serve in parliament, shall ask, receive, or take any money or other reward by way of gift, &c. or agree or contract, for any money, &c. to give his vote, or to refuse or forbear to give his vote in any such election; or, if any person by himself, or any person employed by him, shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, *corrupt or procure* any person to give his vote, or to forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall for every such offence forfeit the sum of 500*l*., and shall, after judgment obtained against him in any proceeding to recover such penalty, be for ever disabled to vote, &c." The penalties imposed by this section are of great severity; and it, therefore, behoves the Court to construe the language describing the various offences with more than ordinary strictness. By the first part of the clause, which part relates to the *voter*, it is made criminal in him to *ask* for a reward for his vote; but by the latter part, which relates to the *briber*, the fact of *offering* a bribe for the purpose of securing a vote is not made penal. The *consent of the voter* is made essential, for otherwise no person can be said to have been *corrupted*. This argument was offered, on behalf of the sitting member, to a Committee of the House of Commons in the *Barnstaple case* (a), and its decision was in favour of the sitting member, though it does not appear that they gave any opinion upon this point. Of course that which was said before the committee is only alluded to as a part of the argument now offered on behalf of the defendant. There was no *assent* in this case on the part of the voter;—there was no

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corrupt contract. [Lord Denman, C. J. There may have been a contract, although it was not performed :—the voter may have been doubly corrupted.] There was no evidence of his having given any promise whatever to the defendant. [Patteson, J. In the first vol. of *Schw. Nisi Prius* (a) it is said, “ If a person give or promise money or other reward to a voter, in order to procure his vote for one candidate, although the voter afterwards vote for another candidate, the penalties of the statute are incurred by the corrupter.” For this Mr. Selwyn cites *Sulston v. Norton* (b).] It may be doubted whether that is good law. There is a most obvious distinction between corrupting or procuring a man to vote, and the mere asking him to do so. Here, there was only an endeavour to corrupt. [Patteson, J. The man received the 5*l*. He must certainly, therefore, have given the party corrupting to understand that he was corrupted. Was not the taking the money itself evidence of a contract? Coleridge, J. Your argument is exactly that which was used in *Sulston v. Norton* (c). There, the defendant had given one Moore five guineas to vote for Lord Villiers and Sir Robert Burdett; Moore, however, voted for their opponent. The action, which was upon the bribery act, charged the defendant with having corrupted Moore to vote for Lord V. and Sir R. B.; and the plaintiff had a verdict. Caldecott moved to set aside the verdict, and argued, that “ corrupting Moore to give his vote” must mean “ actually procuring him to give his vote;” and that, as Moore in fact did not vote for the persons for whom he promised to vote, but for their opponents, the defendant could not be said to have procured him, by a corrupt agreement, to give his vote. A case of *Bush v. Rawlins* was cited contra; and Lord Mansfield said, “ The case of *Bush v. Rawlins* is in point; and I wonder how it could ever be a doubt, for the offence was completely committed by the corrupter, whether the other party shall afterwards perform his promise, or

(a) Page 631 of 7th ed.

(c) 3 Burr. 1235.

(b) 3 Burr. 1235.

break it." Here, as there, the money was taken by the voter, so that the offence of the *corrupter* was complete.] In that case, there appears to have been proof of a corrupt agreement by the voter. [Coleridge, J. Not distinctly so. The evidence of the agreement appears to have consisted in the acceptance of the bribe.] A man cannot be said to have *procured* another by corrupt agreement to give his vote for one candidate, when, in fact, he gave it for another. [Lord Denman, C. J. You assume, that "*procuring*" and "*corrupting*" a voter to give his vote are the same thing. "*Procuring*" implies that the vote was given; but "*corrupting*" not necessarily so.] They appear to be used in the same sense. This part of the clause contemplates the completion of the endeavour to corrupt. Though it may not be necessary that the vote should be given, there must be a *bonâ fide agreement* between the parties. [Coleridge, J. You mean to say this—that even if the voter *promised* to vote, never intending to *perform* his promise, the case would not be within the clause. Therefore, if a man promised two opposite candidates to vote for them, and received a bribe from each, but never intended to vote for either, and did not do so, you would say that neither party bribing would be indictable under this statute.] The argument certainly goes to that extent.

LORD DENMAN, C. J.—It seems to me, that the distinction between the words "*procure*" and "*corrupt*" is decisive against the defendant. A man cannot be said to have *procured* a voter to give his vote to a candidate, unless the vote was actually obtained; but the offence of *corrupting* may well be complete, although the vote was never given. The words clearly have different meanings. I think the offence of *corrupting* was completely established in this case. There is some *slight* difference between this case and that of *Sulston v. Norton*, because there it appeared that when the defendant gave *Moore*, the voter, five guineas, *Moore* gave him a note for the amount, and the defendant

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gave *Moore* a counter-note obliging himself to give up *Moore's* note upon the performance of the condition; whereas here it was merely shewn that the voter *accepted* the money. That acceptance of the bribe was, however, sufficient of itself to shew a *contract*. If it had been left to the jury to say whether the voter had *agreed* with the defendant to give his vote, they would have found that he did so. If it was intended to be denied that there was any real contract, the attention of the learned judge should have been drawn to the subject, in order that the question might have been left by him to the jury. If we were to say that the fact of the voter's *not performing* his promise to vote, or his secretly intending not to abide by the agreement which he was making, made the offence of the *corrupter* less complete, we should be confounding all notions of justice. There most certainly must be no rule.

LITLEDAL, J.—The words “procure” and “corrupt,” used in the act of parliament, have very distinct meanings. To “procure” is to get the thing actually done; but to satisfy the meaning of the word “corrupt,” it is sufficient if a corrupt agreement be made in consequence of the offer of the bribe. There is this distinction certainly between *Sulston v. Norton* and this case, that there the corruption of the voter was really complete, whereas here the voter did not, perhaps, at the time of agreeing, actually intend to give a corrupt vote; but to my mind this distinction is immaterial. I do not, indeed, think that the question is raised as to the effect of the voter's not intending to give the vote, for that fact is not distinctly found. Any positive opinion, therefore, on this point is not called for.

PATTESON, J.—I quite agree with my brother *Storks*, that there is a great distinction between the different parts of this clause;—that, as in the part relating to the voter the word “ask” is used, and not repeated in the latter part, something *more* is requisite in the case of the briber than

the mere *offer* of a bribe. In the case of the *voter*, it is clear from the express words of the clause, that any agreement or contract for any reward to give his vote—whether intended to be performed or not—would make him liable to the penalties of the act. Upon the latter part of the clause the question is, whether the party has by any gift or reward, or by any promise, agreement, or security for any gift or reward, *corrupted or procured* the voter to give his vote in this election. I quite agree with my lord as to the distinction between “corrupt” and “procure.” A party may “corrupt” another to give his vote, although the vote be not given; and I think that the decision in *Sulston v. Norton* is right. But then it is said, that the voter never *intended* to give his vote to this candidate, and that, therefore, he was not *corrupted*. I do not, however, think that it sufficiently appears, that in fact the voter did not intend, at the precise moment of making the agreement, to give his vote accordingly. That fact ought to have been distinctly proved. The judge ought to have been asked to put the question to the jury as to whether the voter did so intend or not. Whether the party did *intend* to give his vote or not, he unquestionably *professed* to intend to do so. If it had been distinctly shewn that the party never did intend to give his vote, that in fact all he did was for the purpose of entrapping the defendant, my present impression is, that the offence of the *corrupter* would nevertheless be complete. Where the corrupter has done all that in him lay towards the corruption of the voter, I am not disposed to think that the intention of the *voter* can affect the corrupter’s liability. If that were otherwise there would be this extraordinary result, that the voter who made the corrupt agreement, not intending to perform it, would be liable under the former part of the section, whilst the corrupter who had completed the offence as far as in him lay, would *not* be liable. If there be an actual agreement to corrupt, and money given by the corrupter in performance, on his part, of that agreement, I must say that it seems to me at present, that the corrupter is liable under this statute.

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COLERIDGE, J.—Although this is a highly penal enactment, we must not, by over-refinement upon its words, prevent their having the effect which they were obviously intended to produce. I think that, under the words of this clause, a party may be guilty of *corrupting*—without *procuring*—a man to give his vote. The fact, therefore, of the voter's having given his vote to another candidate is immaterial. The other point is, perhaps, not properly raised; but though unwilling to give unnecessary definitions, I cannot help saying, that I apprehend that one person must be said to corrupt, and another to be corrupted, within the meaning of this clause, wherever one party gives money for the purpose of getting the vote of the other, and the other party accepts it with the express or implied intention of giving his vote at any election, without looking *into the mind* of the party taking the money, to ascertain whether the intention which he expressly or impliedly professed was his real intention.

Rule refused.

THOMAS v. LAMBERT.

An allegation, in a plea, of an agreement that a workman should not be paid unless the work should be completed *within fourteen days before Michaelmas-day* (a), was held not to be supported by evidence of an agreement that he should not be paid unless the works should be completed *fourteen days before Michaelmas-day*.

ASSUMPSIT for work and labour and materials. The defendant pleaded, first, non-assumpsit; secondly, as to 13*l.* parcel &c., that it had been specially agreed between the plaintiff and the defendant, that if the work, in respect of which the 13*l.* was claimed, should not be completed *within fourteen days before* the 29th September, 1834, the plaintiff should not be paid for it, and that in fact the work had not been completed within fourteen days before 29th September. The defendant paid into Court 5*l.* 16*s.* 3*d.*, being the residue of the plaintiff's demand. The plaintiff took the 5*l.* 16*s.* 3*d.* out of Court, joined issue upon the first plea, and traversed the contract stated in the second plea—

(a) *Vide post*, 593 (a).

upon which issue was joined. At the trial before Lord Denman, C. J., at the Middlesex sittings after last term, the plaintiff proved that he had done work for the defendant to the value of the 13*l*., and the defendant, in support of his second plea, proved a verbal agreement between the plaintiff and himself, that if the work were not done *a fortnight before* Michaelmas-day, 1854, the plaintiff should not be paid. The work had not been *completed* even at the time of the trial. The learned judge thought that the agreement proved by the defendant did not correspond with that set out in the plea, by reason of the introduction, in the plea, of the word "*within*," and he directed the jury accordingly. The plaintiff had a verdict with 13*l*. damages.

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Platt now moved for a new trial, on the ground of misdirection by the learned judge; and he contended that the expression used in the plea, and that established in the evidence, had, in effect, the same meaning.

LORD DENMAN, C. J.—The contract *proved* was, that the work should be done *without* the fortnight, whereas the contract stated in the plea is, that it should be done *within* the fortnight. The issue was, whether such a contract as that stated had been entered into. It seems to me that the introduction of the word "*within*," into the plea, has occasioned a variance which is fatal.

LITLEDALE, J.—The expression "*within* a fortnight before Michaelmas (*a*)," means within the fortnight elapsing next before Michaelmas, and not the period elapsing be-

(*a*) This obscure expression was probably used, however inaccurately, as equivalent to "*within* the period, which will expire fourteen days before Michaelmas-day," in which sense the allegation would correspond with the proof. In the strict grammatical sense in which

the language of the plea was construed by the Court, the words "*within* fourteen days" appear to be superfluous, as it could hardly be the object of the parties to *delay* the completion of the work *until* the last fourteen days had begun.

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tween the time of making the contract and the fortnight before Michaelmas.

PATTESON, J.—It is very difficult to say what “within a fortnight before the 29th September,” means. I certainly think that it does not mean *before* the fortnight before Michaelmas-day, and therefore I think that there is a variance between the plea and the evidence.

COLERIDGE, J.—The difficulty, if any, arises from our knowing what the facts were. If we looked only at the words “within fourteen days before the 29th September,” we should have no doubt that they meant—at some time *during* the fortnight which would elapse next before Michaelmas-day.

Rule refused.

The KING v. The Inhabitants of WHITNEY.

Though there cannot be a bridge which the county is bound to repair, where there is no *cursus aquæ*, yet it is a question of fact in each case, whether an arch thrown over a *cursus aquæ* is such a bridge or not. *Semble.*

The fact of the arch or bridge having no *parapets*, does not of itself prevent its being a county bridge.

INDICTMENT against the parish of Whitney for the non-repair of a certain highway, part of which, containing in length 374 yards from A. to B., was alleged to be out of repair. At the trial before *Park, J.* at the last Herefordshire assizes, it appeared that, upon an indictment for the non-repair of the same road in 1828, the defendants having first pleaded not guilty, afterwards withdrew their plea, and pleaded guilty. It appeared also, that, within the limits of the part of the road alleged to be out of repair, there was a mill-stream, over which there was a stone arch nine feet broad and five feet and a half above the ordinary level of the water, which was ordinarily three feet deep, but occasionally, in consequence of rain, much deeper. The bridge appeared by a date on the key-stone to have been built in 1762. There were no *parapets*, nor was there any pro-

Judgment by default upon an indictment for non-repair of a highway, is not *conclusive* evidence against the parish of a liability on their part to repair such highway. *Semble.*

tection on either side. Surveyors, who were called on the part of the prosecution, and who described the state of the bridge and of the road adjoining it, said, that the arch was a *culvert* and not a *bridge*, because it had no *parapets*. It was contended, on the part of the defendants, that this was a public *bridge*, which, with the approaches, the *county*, and not the *parish*, were liable to repair. This was denied on the part of the prosecutor. It was also contended by the prosecutor, that the record of the conviction in 1828 was conclusive evidence of liability, on the part of the parish, to repair the whole road, including the bridge, between the limits included in that indictment. These two questions being argued before the learned judge, and put to him as questions for his decision, his lordship said, "I should say, that the question, as to whether this is a bridge, or not, is a question for the jury; but if you throw it upon me, I should say that it was a culvert, and such a culvert as the county are not bound to repair. If I am to say that such a thing as this is part of the road, I am of opinion that it is. You have a right to move it, if you like. I think you have concluded yourselves by the indictment of 1828." The only question left to the jury was, whether the road was out of repair, and they, being of opinion that it *was* so, found the defendants guilty.


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Talfourd, Serjt. now moved for a new trial, on the ground of misdirection. The learned judge, upon the evidence of the surveyors, who said that the arch was a *culvert*, and not a *bridge*, because there were no *parapets*, decided that it was a culvert, and that therefore the county were not bound to repair. The liability of the county cannot depend upon any artificial distinction which surveyors may make. In *Rex v. The Inhabitants of Oxfordshire* (a) the Court decided that the question of bridge or no bridge was a question of *law*. [*Patteson*, J. The Court in that case only decided that there can be no bridge where there is no

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 Culvert,—or
 bridge.

(a) 1 Barnw. & Adol. 289.

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Second point.
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cursus aquæ.] The question, whether the mere fact of a bridge having no parapets can make this arch not a bridge which the county are bound to repair, must be a mere question of *law*. It is submitted that this *was* a county bridge, notwithstanding the want of parapets.

Then, with regard to the judgment by default upon the indictment of 1828, it was contended that this was conclusive evidence of liability on the parish to repair all that lay between the termini of the road indicted; and that, therefore, the parish cannot now say that any part of the intervening road was reparable by the county only. The learned judge adopted this argument, but the point was not ultimately material, by reason of the decision against the defendants upon the other point. It cannot be correct to say that the judgment by default was *conclusive* evidence of liability to repair all the road specified in the indictment. The liability of the parish to repair a road arises by prescription. This is not conclusive evidence of prescriptive liability. [Lord Denman, C. J. It is evidence that you have treated the bridge as part of the public road.] That may be so; but it is not *conclusive* evidence of that fact. Supposing that the judgment was conclusive evidence of liability to such an extent as would support a conviction, yet it was not conclusive evidence of liability to repair the whole of that which is specified in the indictment. The only authority, to shew that a judgment by default upon an indictment for non-repair of a highway is for all time conclusive evidence against the parish, is a note of Mr. Serjt. Williams to 2 Saunders, 159 c, citing *Rex v. Townshend* (a), which, however, is not exactly in point. Such a rule would be highly dangerous, as it would have the effect of putting great power in the hands of the legal advisers of the parish for the time being.

LORD DENMAN, C. J.—I think that there is no ground for granting this rule. If the judge had laid it down as a

(a) 1 Douglas, 421.

point of law, that no bridge without a *parapet* could be such a bridge as the county would be liable to repair, his ruling would have been wrong. It is impossible to say that the mere absence of parapets can prevent a bridge from being such a bridge as the county are liable to repair; nor, on the other hand, can it be said, that the mere fact of an *arch* passing over a *stream* is sufficient to constitute a bridge so as to charge the county. But the question, whether this particular arch was a county bridge or not, appears to have been left to the judge, and he decided it as a question of fact, not of law. The question having been put to him, I see no objection to his deciding as he did. There must be an arbitrary power somewhere, either in the jury or the judge, to say whether a particular arch is a county bridge or not. The learned judge laid down no point of law. With regard to the question as to the judgment by default, when the learned judge said, "I think you have *concluded* yourselves by the indictment of 1828," he appears merely to have adverted to it as a strong fact.

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LITLEDALE, J.—If the learned judge had said that the absence of parapets to a bridge deprived it of the character of a county bridge, I should have thought he was wrong. But he laid down no such rule. And, with regard to what he said about the former indictment, I apprehend that he did not say that, *in point of law*, it was *conclusive*.

PATTESON, J.—I am of the same opinion. With regard to *Rex v. Oxfordshire (a)*, I do not understand that case as laying down that every *arch* thrown over a *cursus aquæ* is a bridge, but only as deciding that, in order to constitute a bridge, there *must be* *cursus aquæ*.

COLERIDGE, J. concurred.

Rule refused.

(a) *Suprà*, 595.

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DOE *d.* PHILIPS, and MARY his Wife, *v.* MORRIS.

In ejectment by the heir of *A.* the defendant sets up a will of *A.*, whereby he devises all his property in fee to *B.*, through whom the defendant claims. One of the attesting witnesses stated that he had prepared this; that a fortnight afterwards he prepared another will for *A.*, which *A.* executed and delivered to him, and which the witness upon *A.*'s death delivered to *B.* No notice to produce the last-mentioned instrument had been given:—Held, that the plaintiff's counsel could not ask the witness "whether at the time of executing the instrument, *A.* declared it to be his last will, and if so, whether it was attested by three witnesses."

EJECTMENT to recover a farm called Tersace, in the county of Pembroke. At the trial before *Williams, J.*, at the last assizes at Haverfordwest, the defendant admitted the plaintiff's title in right of *Mary Phillips*, as daughter and heir of *Henry Johns*, but set up a will of *Johns* made in 1819, by which, after a legacy of 40*l.* to his daughter, then *Mary Johns*, he bequeathed *all his property* to his wife, *Anne Johns*, who afterwards married the defendant, and had died before the commencement of the action. This will was executed by the testator as a marksman, in the presence of three attesting witnesses. One of the attesting witnesses being called, stated in his cross-examination, that he had prepared the will produced; that about a fortnight afterwards he had prepared another will for the testator; that the testator had signed it, and had delivered it to him; and that upon the death of the testator he had delivered it to his widow. The witness being asked by *Chilton*, for the plaintiff, whether at the time when the testator signed the paper, he made any declaration as to its being his last will; and it being further proposed to ask the witness, whether he together with other persons, or any three other persons, had, upon the testator's declaring it to be his last will, signed the paper, the learned judge interposed, and said that the will itself would shew whether it was executed and attested, and that as it had been traced to the hands of the widow, through whom the defendant claimed, and no notice to produce had been given, the witness could not be asked this or any further questions concerning it. The defendant had a verdict.


Quere, whether if the second instrument in this case could have been shewn to have been duly executed, published, and attested, as the last will of *A.*, the plaintiff would have been entitled to recover as heir at law, without shewing its contents or application.

Semble, that an instrument which has been traced to the hands of an opposite party, can in no case be *presumed* to have been lost or destroyed, unless such party has had notice to produce it.

Chilton moved for a new trial, on the ground of an improper rejection of the evidence. The objection was premature. The plaintiff's counsel had put no question, nor did he propose to put any question, as to the *contents* of the will, and he had not only a right, but he was bound, to shew that the will had been duly *executed*, (or, in other words, that it was a will,) before he could go on to prove by whom it had been kept, or lost, or destroyed. The proof of its origin must precede the inquiry into its subsequent history. If the plaintiff had given notice to produce this will, and had begun by calling for it, he would have been told by the defendant's counsel,—“First, prove that there ever was such a will; secondly, that it ever came into the possession of the defendant; and then, and not till then, you will be entitled to ask, whether I will or will not produce it.” The fact of the execution of a later will being once established, the evidence that it had got into the hands of the person through whom the defendant claims, together with the fact of his now setting up the earlier will, would have been evidence from which the jury might have presumed a destruction of the later will, by the person claiming under the earlier one. [*Littledale, J.* The rule of law is, that before you talk of a written instrument, you must produce it, or shew that you have used all proper means to get at it in vain.] The rule, it is submitted, is confined to the *contents* of a written instrument; but the lessor of the plaintiff could not possibly, in this instance, be prepared either to produce the will or to shew that he had given the defendant notice to produce it. The plaintiff's title as heir was to be defeated by the will, i. e. the last will, and therefore he must have expected that the last will would have been produced. The knowledge which he obtained as to the making of a later will than that produced, arose upon a cross-examination of the defendant's witnesses. [*Patterson, J.* Unless you had the means of producing the will, or shewing that it was destroyed, all your questions would lead to nothing. Lord *Denman, C. J.* You must shew the paper to have been a will. The mere fact of shewing that the

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testator signed *a paper*, declaring it to be his will, and that it was attested by three witnesses, does not at all affect the question.] There would have been evidence of a destruction of the second will by the widow, through whom the defendant claimed, and therefore this must be taken to be the case of a defendant who had himself destroyed a later will, setting up an earlier will in answer to the claim of the heir at law. Now, though in *Harwood v. Goodright (a)*, where it merely appeared that a testator made a will of land subsequent to that set up as a defence to an ejectment, and that the later will contained different dispositions in unknown particulars, but that the fate of such will was unknown, it was held that the heir at law was nevertheless not entitled to recover; yet it would appear from the judgment in that case, that the Court would have come to a different conclusion, if it had appeared as a fact, instead of being expressly negatived by the jury, that the defendant who set up the earlier will had himself *destroyed* the later one. The defendant here attempts to defeat the title of the heir by setting up a will as being the *last* will of the ancestor. If the plaintiff can shew that this will has been revoked by a subsequent will, though he cannot shew the *contents* of the second instrument, yet the title of the heir is again let in. [*Patteson, J.* In the case cited, it was not disputed that the second will related to the same land.] Here, the first will disposed of the *whole* of the testator's property, and the second will was made a fortnight afterwards. That second will *must* have related to the *same* property, and must have contained a *different disposition* of it. [*Patteson, J.* The second will may have related to the testator's chattel property only.] But the presumption will be against the person who has destroyed it; and it may have devised this very property to the present claimant.

Lord DENMAN, C. J.—It appears to us impossible, upon this motion, to give a new trial. When a will is talked

(a) Cowper, 87.

of, which is not produced, the next thing must be to shew that proper means have been used to bring it before the Court, if possible. It must be shewn to have been *lost or destroyed*, after which the party may shew the contents; or, if traced into the hands of the opposite party, it must be shewn that he has had *notice to produce* it. The Court cannot presume the instrument to have been lost or destroyed in this case, for it may now be in the hands of the defendant, ready to be produced, if required. The plaintiff should move for a new trial on the ground of surprise (*a*). We might then grant him a rule, and reserve the question of costs.

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LITLEDALE, J.—I am entirely of the same opinion. The instrument was traced into the hands of the defendant, and therefore the plaintiff was bound to shew that he had given *notice to produce* it, according to the ordinary rule of law. Unless the party relying on the supposed will produces it, or, having traced it to the hands of the party, proves that he has given notice to produce, or unless he shews that the will was lost or destroyed before coming to the hands of the opposite party, I do not see how he can talk of it as a *will*. There was no immediate evidence in this case, of the will having been destroyed.

PATTESON, J.—It was absolutely necessary, in order to shew that the second will was a revocation of the first, to prove the contents of the second will, that is, that it related to the same property. We cannot *presume* a loss in this case, for the defendant may still have the will in his hands. If it had not been *traced to the hands of the defendant*, the case might have been quite different. Here, however, it is traced to the hands of the defendant, and there has been no notice to produce. We cannot say that the learned judge was wrong. It seems to me that he stopped the evidence at the right point.

(*a*) A rule nisi has been obtained on this ground.

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COLERIDGE, J.—It is quite necessary, where an instrument is traced to the hands of an opposite party, for safety in the administration of justice, that there should be a *notice to produce it*.

Rule refused.

Sir ROBERT CLAYTON, Bart. v. GREGSON.

In an action for breach of a covenant, in a lease of coal-mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine" at a certain point, evidence is receivable to shew that by the miners in the neighbourhood, the word "level" is used in a certain peculiar sense.

COVENANT upon an indenture of lease of certain coal-mines and lands and tenements, in the parishes of Blackrod and Arlington, Lancashire. One of the covenants on the part of the defendant was, that he would, before 30th December, 1832, get the whole and every part of the demised mines, beds, and veins of coal, lying in or under the messuages, tenements, closes, &c. thereinbefore mentioned to be situate in Blackrod, *not deeper than or below the level of the bottom of the said mine, bed, or vein of coal called the Arley Mine, under a certain part or point* (marked in the plan thereupon indorsed with the letter A.) of the close in Blackrod aforesaid, called the Nearer Oldfield. The covenant then goes on more particularly to describe the point stated to be marked "A." in the plan, and provides that for all such parts of the several demised mines as the defendant therein covenanted to get, the reserved rent (which was at the rate of so much *per acre* of coal) should be paid whether the coal were gotten or not. Breach: that the defendant did not, before 30th December, 1832, get the whole of the mines under the said closes &c. in Blackrod, not deeper than or below the level of the bottom of the said mine, called the Arley Mine, under the said point marked A.; and that on 30th December, 1832, 100 acres of each of the several mines lying not deeper than or below as aforesaid, remained ungotten; and thereupon 62,000*l.*, being according to the rate per acre, became due to the plaintiff.

At the Lancashire spring assizes, in 1834, the cause was tried before *Alderson, J.*, when a verdict for 1s. damages was taken by consent, upon breaches of other covenants; and upon the breach above-mentioned, the main question ultimately turned upon the meaning of the expression "not deeper than or below the *level* of the bottom of" &c. The plaintiff contended that the word "level" must, in the absence of any latent ambiguity, necessarily be taken to mean "*horizontal level*," and that therefore the defendant was bound by the covenant to get all such parts of the mines as were not below the horizontal level of that point of the bottom of the Arley mine, which corresponded to the point of the surface of the earth marked "A." in the plan. The defendant's counsel contended, that in the understanding of *miners* the expression had a different meaning, and that this being a mining lease, the expression ought to be taken in its technical and not in its popular sense, and they proposed to call witnesses acquainted with the art of mining, as it was exercised in the neighbouring country, to shew the peculiar meaning attached to the expression by miners; 3 *Starkie on Evidence*, 1028, et seq. (a), and *Smith v. Wilson* (b), and other cases were cited. The learned judge, though not free from doubt upon the question as to the admissibility of this evidence, rejected it. It was then agreed between the parties, that according to the construction put upon the covenant by the *plaintiff*, he was entitled to 22,000*l.* damages, but that, according to the defendant's construction of it, the damages ought to be 5000*l.*, and no more. It was further agreed, that the question as to the admissibility of the evidence, should be submitted to this Court, upon a motion to reduce the damages, or for a new trial, and that in case this Court should be of opinion that the evidence ought to have been received, a legal arbitrator should be appointed to hear the evidence, and to determine whether the defendant's construction of the covenant was or was

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(a) Of the 1st edition; in vol. ii. p. 547, et seq. of the 2d edition.

(b) 3 Barn. & Adol. 728.

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not correct, according to the understanding of miners; the verdict to be reduced to 5000*l.* or to stand for 22,000*l.* accordingly. This arrangement having been communicated to the judge, his lordship directed the jury to find a verdict for 22,000*l.*, which they accordingly did.

In Easter term, 1834, *F. Pollock* obtained a rule nisi to reduce the damages to 5000*l.*, or for a new trial.

Coltman and *Cowling* now shewed cause. Unless upon looking at the terms of the covenant, taken by itself or in connection with the rest of the deed, the Court can perceive an ambiguity, parol evidence ought not to be received. Where words of doubtful import are used, evidence may be received for the purpose of applying the instrument to its proper subject-matter; and in general, where terms are used in a peculiar sense by mercantile men, parol evidence may be received to interpret them; but this exception to the general rule is, even in the cases of mercantile contracts, limited to those cases in which, upon the face of the contract, something of a doubt is raised by the use of the words. Where in a mercantile contract, or in a contract made between persons of a particular class, words are used which are ordinary expressions, having in the English language a precise and well-known meaning, evidence cannot properly be received for the purpose of shewing that amongst the merchants, or the particular class of persons, those words are used in a *distorted* sense. This limitation of the rule above alluded to, is in itself founded on good sense, and is to be deduced as a rule of law from the observations of the Courts and judges in *Baker v. Payne*(*a*), *Blunt v. Cumyns*(*b*), *Anderson v. Pitcher*(*c*), *Cross v. Eglin*(*d*), *Attorney-General v. Cast Plate Glass Company*(*e*). The rule, indeed, with this limitation, is in effect a branch of the rule, that where an ambiguity appears upon the contract, parol

(*a*) 1 Vezey, sen. 456.

(*b*) 2 Vezey, sen. 331.

(*c*) 2 Bos. & Pull. 164.

(*d*) 2 Barn. & Adol. 106.

(*e*) 1 Anstr. 39.

evidence may be received for the purpose of directing its application. There are certain cases, as that of *Smith v. Wilson* (a), (in which evidence was received to shew that by the custom of the country where a certain lease of a rabbit warren was made, a “*thousand rabbits*” meant 1,200 rabbits,) which have decided that where terms of *number* and *measure* are used in contracts, evidence may be received to shew that by the custom of the particular country or trade, they are used in a peculiar sense. But terms of number and measure stand alone in this respect, the rule with regard to them having been relaxed, probably owing to certain *acts of parliament* having treated them as capable of bearing various senses, according to the subject-matter, the trade, or the locality.

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Sir F. Pollock, (with whom were *Wightman* and *Addison*,) contrà, was, in the early part of his argument, stopped by the Court.

LORD DENMAN, C. J.—We are all of opinion that the evidence was receivable. “*Level*” does not appear to me to be in itself a word which has any particular meaning attached to it under *all* circumstances; and therefore in order to know what these parties meant, the evidence should have been received. With the *effect* of the evidence, when received, we have nothing to do. It is enough to say that the word *level*, being used by parties with reference to that which is in the nature of a *trade*, in which it may consistently with its general meaning have a *peculiar* meaning, it was necessary to hear from witnesses what the meaning was. I am not sure that the doctrine has not been carried further than that. It is not necessary to go further, however, in a case of this sort, where the word is both to a certain degree ambiguous, and is clearly a technical term with reference to the subject-matter.

(a) 3 Barn. & Adol. 728.

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LITLEDALE, J.—I do not think this is a question so much about latent ambiguity as it is about the construction of a word in the English language. I do not think it can be said, that in ordinary language the word “level” invariably means “horizontal” or “horizontal line.” It is like many other words in our language, which have various meanings, according to the subject-matter to which they are applied, or the parties by whom they are used. The same word may have twenty different meanings.

PATTESON, J.—This is the case of a mining lease, and the word must be construed, *secundum subjectam materiam*,—as a mining word. *We* do not know what that meaning is:—Evidence ought therefore to be received (a).

COLERIDGE, J. concurred.

A question having been put to the Court, as to the form of the rule,

Lord DENMAN, C. J.—We have nothing to say except that the inquiry should proceed. The evidence appearing to us to be receivable, for the purpose of shewing in what sense the parties to this instrument used the term, it must be referred to the arbitrator, to decide upon the effect of the evidence.

PATTESON, J.—The question is not to be confined to the ordinary meaning of the specific word “level” at all; it is here necessary to ascertain what the meaning of the term is *locally*.

(a) And see Hob. 169; 1 Roll. Abr. 86; 1 Danv. Abr. 161.



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CHAPMAN v. KEANE.

ASSUMPSIT on a bill of exchange, by indorsee against drawer. Pleas: first, that the defendant had not due notice of the dishonour of the bill; and, secondly, usury. The cause was tried before *Tindal*, C. J., at the Guildford assizes, in 1834, when the following facts were proved:

The bill had been drawn by the defendant on and accepted by Lord *E. T.* The defendant indorsed it in blank, and delivered it to one *Wiltshire*, who discounted it. Previously to the discounting of the bill by *Wiltshire*, it had been indorsed by the plaintiff, upon the desire of one *Keilly*, the defendant's agent, and in consideration of his buying a quantity of goods, and guaranteeing a third of the amount of the bill. *Wiltshire* left the bill in the hands of the plaintiff's clerk with instructions to obtain payment, or give notice of dishonour. The clerk gave notice to the defendant, in the name of the plaintiff—not in that of *Wiltshire*. It was objected, on the part of the defendant, that there was no evidence of *due* notice of dishonour. The learned Chief Justice upon this nonsuited the plaintiff, but gave him leave to move to enter a verdict. A rule nisi having accordingly been obtained,

Held, that notice of dishonour of a bill of exchange is sufficient, if given by any person who is party to the bill, and that it need not proceed either immediately or derivatively from the holder.

Thesiger and *Platt* now shewed cause. The question is, whether notice of dishonour *must* be given by the *holder*, or may be given by another person. In *Tindal v. Brown*(*u*), it was expressly determined that notice of dishonour must come from the *holder*. [Lord *Denman*, C. J. *Ex parte Barclay*(*b*) is an authority to the same effect.] The object of *notice* is to inform the party where the bill is, that he may take it up. [Lord *Denman*, C. J. Not only that, but

(a) 1 T. R. 167.

(b) 7 Ves. jun. 597. And see *Stanton and others v. Blossom and*

others, 14 Massach. Reports, 116; *Bank of Utica v. Smith*, 18 Johns. Reports, 230.

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to inform him that the party who gives the notice looks to the party to whom the notice is given for payment.] The policy of requiring notice from the holder is, that the party may protect himself, by immediately taking up the bill. If the notice in this case was sufficient, *Wiltshire* might have commenced an action, although the defendant was ignorant where *Wiltshire* was, and could not therefore have prevented the action by payment to him. In *Stewart v. Kennett (a)*, Lord *Ellenborough*, at nisi prius, held, that the notice must come from the holder. His lordship there said, "the notice must come from the person who can give (b) the drawer or indorser his immediate remedy upon the bill, otherwise it is a mere historical fact." A contrary doctrine was laid down in *Rosher v. Kieran (c)*, *Jameson v. Swinton (d)*, and *Wilson v. Swabey (e)*. But in those cases the previous authorities were not discussed or cited.

Adolphus, in support of the rule. All the cases on this subject have been cited. *Stewart v. Kennett* is distinguishable from the present case. There the notice was given by a mere stranger, a person who was neither party nor agent to any party to the bill. *Wilson v. Swabey* was decided by *Lawrence, J.*, *Jameson v. Swinton* by Lord *Ellenborough*. It is not to be presumed that either was ignorant of or passed over the previous authorities. If the object of notice is that the party may pay the bill, he certainly

(a) 2 Campb. 177.

(b) But in *Rosher v. Kieran*, 4 Campb. 87, a notice given by the acceptor was held sufficient.

(c) 4 Campb. 87. See the preceding note.

(d) 2 Campb. 373.

(e) 1 Stark. N. P. C. 34. In that case, and in *Jameson v. Swinton*, the point can hardly be said to have arisen. Notice was given by the holder to the last indorser,

and by the latter to the defendant, who was his immediate indorser, and the objection taken was, that the defendant should have had notice immediately from the plaintiff. The only consequence of the omission of the immediate notice to the first indorser, was to expose the holder to the risk of losing his remedy against such first indorser, in case the second indorser had omitted to pass on the notice.

might have done so here. In *Chitty on Bills* (a) all the authorities are collected, and the author states it as the result of the authorities, that it is not absolutely necessary that the notice should come from the person who holds the bill at the time when the notice is given, and that it is sufficient if it be given after the bill was dishonoured, by any person who is a party to the bill, *and who would, on the same being returned to him* (b), have a right of action thereon. [Lord Denman, C. J. In *Bayley on Bills*, it is said, that it is *better* (c) that notice should come from *all* the parties to the bill.]

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Cur. adv. vult.

LORD DENMAN, C. J., on a subsequent day, delivered the judgment of the Court:—On the trial of this action by the indorsee against a drawer of a bill of exchange, the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonour. The bill had been indorsed by the plaintiff by the desire of *Wiltshire*, who had discounted it, and left it in the hands of the plaintiff's clerk, with instructions to obtain payment, or give notice of dishonour. He did give notice to the defendant,—but in the name of the plaintiff, not in that of *Wiltshire*, the then holder, who had deposited the bill with him. The objection to the plaintiff's right to recover was founded on *Tindal v. Brown*, in which case all the judges of this Court, except Lord Mansfield, considered a notice given by one who was not the *holder* (d) as no notice, on the ground that the drawer was not thereby apprised of the *holder's* intention to look to him for payment. And this case was distinctly recognized,

(a) *Chitty on Bills*, 227, 7th ed.

(b) *Vide supra*, 608 (e). It is believed that all the foreign writers upon bills of exchange, are silent as to any notice of dishonour, (dénonciation du protêt,) except that proceeding from the holder of the

bill, either immediately, or derivatively through those anterior parties who have received notice from the holder.

(c) *Vide supra*, 608 (e).

(d) *S. P. Esdaile v. Sowerby*, 11 East, 117.

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and its principle adopted, by Lord *Eldon*, in *Ex parte Barclay* (a).

Notwithstanding these high authorities, it is clear from *Jameson v. Swinton*, *Wilson v. Swabey* (b), and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill, may avail himself of notice given, in due time, by *any party* to it. In the *nisi prius* cases above referred to, no express allusion was made to *Tindal v. Brown* (c) or *Ex parte Barclay*, but we can hardly conceive that they were not present to the recollection of Lord *Ellenborough* and Mr. Justice *Lawrence*, or the counsel engaged. Those learned judges indeed decided them at *nisi prius*, but without their decisions being questioned. We are now compelled to determine whether the case of *Tindal v. Brown*, as to this point, be good law,—and we think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice, but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers (d), and the drawer, unless each of those parties should in succession take up the bill *immediately* on receiving notice of dishonour,—a supposition which cannot be reasonably made. We may add, that in *Tindal v. Brown*, this point was not necessary for the decision of the case, as this Court, including Lord *Mansfield*, granted a new trial on a different ground.

Rule absolute (e).

(a) 7 Ves. jun. 597, with which the American cases referred to, *suprà*, 607 (c), appear to agree.

(b) As to how far these cases are reconcilable with *Tindal v. Brown*, *vide suprà*, 608 (e).

(c) 1 T. R. 167; *suprà*, 607.

(d) *Vide suprà*, 608 (e).

(e) See *Nicholson v. Gouthit*, 2 H. Bla. 609. And see *Solarie v. Palmer*, 1 Bingh. N. S. 194, and 5 Moore & Scott, 1.



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PHILPOTT v. KELLEY.

TROVER for a pipe of port wine and 1000 bottles. Pleas: first, not guilty: secondly, not guilty within six years. At the trial before Lord *Lyndhurst*, C. B., at the Maidstone spring assizes in 1834, the following facts appeared:—

October, 1825. The plaintiff requested one *Croasdill* to keep a pipe of port wine for him in *Croasdill's* cellar. *Croasdill*, who resided with his mother-in-law, the defendant, finding his own cellar (which was a private cellar in the defendant's house) too small, deposited the pipe of wine, and some bottles belonging to the plaintiff, in the defendant's cellar, with her permission.

November, 1826. *Croasdill* became bankrupt; and some time before Christmas, 1826, his assignees demanded the wine.

22nd December, 1826. The plaintiff's solicitors wrote to the defendant as follows:—

"Madam—We are informed by Mr. *Philpott* (the plaintiff) that a pipe of port wine, purchased and paid for by him, and in your custody, has been applied for under the pretence that it belongs to the assignees of *Croasdill*, pipe of wine and some bottles with the defendant, it is not sufficient for the defendant, in supporting a plea of the statute of limitations, to shew the mere fact of the wine having been *bottled* more than six years before action brought, and whilst the wine continued in her cellar.

Nor though that fact be followed by consumption of a part of the wine within six years before action brought.


Nor is it a sufficient answer to the *whole demand* to shew that a *part* of the wine was consumed more than six years before action brought. Per *Patteson, J.*, and *Coleridge, J.*

Semble, that a destruction by the bailee of part of the goods deposited, he having the residue (uninjured by the destruction of the other part) in his possession, ready to be delivered up, will not entitle the bailor to maintain trover for the whole. Per *Patteson, J.*

A letter written to a bailee by the bailor's attorney, within six years before action brought, in which he says that the bailor has instructed him to commence the necessary proceedings for the recovery of the goods, which were deposited with the bailee and demanded as long ago as on a day named—more than six years before action brought,—and threatening to commence proceedings if the goods are not delivered within a week,—is evidence of a demand and refusal, more than six years before action brought, proper to be submitted to the jury, under a plea of the statute of limitations to trover for the goods, *semble*.

Where, in trover by bailor against bailee, the defendant pleads the statute of limitations, it is not sufficient for the defendant to prove acts done more than six years before action brought, which the bailor might, at his option, have treated as acts of conversion, but he must prove clear unequivocal acts of adverse ownership.

Where, in trover for wine and bottles, the plaintiff shews that more than six years before action brought he deposited a

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who has been declared a bankrupt. We therefore, as solicitors for Mr. *Philpott*, give you notice not to part with the same to any one but such person as shall be duly authorized to receive the same by Mr. *Philpott*, or by us as his solicitors."

January, 1827. The wine, which was becoming deteriorated from remaining too long in the wood, was drawn off and bottled by the defendant; and afterwards a considerable quantity was drunk, though *when* drunk did not appear.

22nd November, 1827. The plaintiff's solicitors wrote another letter to the defendant as follows:—

"Madam—Mr. *Philpott* has instructed us to commence the necessary proceedings for the recovery of the pipe of wine, which for his convenience was placed in your cellar, and was *demanded of you so long ago as the 12th March last*; but as Mr. *Philpott* has no wish to put you to any unnecessary inconvenience or expense, we have to propose to you that in case you will deliver up the same to him within a week from the present time, he will indemnify you against any claim that may hereafter be set up by any other person to the same. As the matter cannot be allowed to remain any longer unsettled, we shall commence proceedings against you without further notice, unless the wine is delivered within the time above stated."

4th April, 1833. *Croasdill's* assignees having abandoned all claim to the wine, the plaintiff demanded, and the defendant refused to deliver, the wine.

18th October, 1833, the present action was commenced.

The plaintiff having made a *prima facie* case by shewing the fact of the deposit, and of the demand and refusal as above, the remainder of the evidence above stated was given on behalf of the defendant, in support of his plea of the statute of limitations, as shewing that there had been a conversion (*a*) by the defendant more than six years previously to the commencement of the action, either by the bottling and drinking of a part of the wine, or by the non-delivery

(*a*) *Vide post*, 624 (*u*).

after the letter of December, 1826, and that of March, 1827, referred to in the letter of November, 1827. The lord chief baron was of opinion that there was not sufficient evidence of a conversion more than six years before the commencement of the action; but nevertheless left the question to the jury, who found a verdict for the plaintiff. Leave was then given to the defendant to move for a nonsuit, if the Court should be of opinion either that the bottling and consumption of the wine, or the demands, singly, or the consumption and demands taken together, amounted to a conversion so as to sustain the plea. In Easter term, 1834, *Platt* obtained a rule nisi to enter a nonsuit; against which,

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Spankie, Serjt., and *Channell*, now shewed cause. The defence is, that more than six years before the commencement of the action there had been a conversion by the defendant; first, by a demand and refusal; and, secondly, by reason of the bottling and drinking of a portion of the wine.

I. Both the demand and refusal must be unqualified. After the wine had been deposited in the defendant's cellar, *Croasdill* became bankrupt, and his bankruptcy gave rise to conflicting claims. The letter of December, 1826, was simply a direction, on the part of the plaintiff, not to deliver up the wine to the assignees of *Croasdill*—not a demand by the plaintiff. Then, as to the letter of 22d November, 1827. That letter itself is dated *within* six years of the commencement of the action; but then it is true that it alludes to a demand made in the previous month of March, which was *more* than six years before the commencement of the action. There was, however, no evidence of what followed that demand. It is shewn that there were conflicting claims; and all that can be fairly inferred from the non-delivery of the wine after that demand is, that the defendant, learning that there were conflicting claims, took time to make inquiry. There is no evidence of any *refusal*, by the defendant, to comply with the demand; and if there

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had been a refusal, it may have occurred *within* the six years.

II. The merely putting the wine into bottles would not amount to a conversion. It is said that part of the wine was drunk, but *at what period* does not appear. An act of ownership exercised over the property of another, must, to constitute a conversion, be most distinct. [*Coleridge, J.* It appeared by the evidence that the wine was becoming injured by remaining in the wood.] Where an act is done to the property of another, though without the knowledge of the owner, which amounts to a conversion, the owner is barred by the statute of limitations from bringing an action of trover after the six years. But *Granger v. George* (a) and *Bree v. Holbech* (b), and other decisions, establish this distinction—that the act which constitutes the conversion must not be fraudulent. [*Patteson, J.* What Lord *Tenterden* says in *Granger v. George* is, that that species of fraud *which conceals the act done* from the owner, prevents the operation of the statute of limitations.]

Thesiger and *Platt*, in support of the rule. The defendant is entitled to a nonsuit, on the ground either of an actual conversion or of a demand and refusal (which would be evidence of a conversion) more than six years before the action was commenced.

The wine was bottled at the end of 1826 or the beginning of 1827. Where goods are left with a depositary, he is not at liberty to exercise any thing like a right of ownership over them. Any act of ownership amounts to a conversion: *Richardson v. Atkinson* (c). It is suggested that the wine was bottled for the sake of preserving it. The object of the *bottling* is explained by the subsequent *consumption* of the wine. It is clear that at the time of the demand and refusal in 1833, it was impossible to comply with the re-

(a) 7 Dowl. & Ryl. 729; 5
Barn. & Cressw. 149.

(b) 2 Dougl. 655.
(c) 1 Stra. 576.

quest, because a part of the wine had been drunk. When did that impossibility arise? In January, 1827; because it was impossible at that period to deliver the identical subject-matter of demand.

There can be little doubt that there was an absolute demand and an unqualified refusal more than six years before this action was brought. It is clear that the plaintiff refused to recognize the title of *Croasdill's* assignees. The first letter, in December, 1826, is from the plaintiff's solicitors, and desires the defendant not to part with the wine to any one except upon the order of the plaintiff or his solicitor. Then the letter of November, 1827, shews that a letter had been written in March, demanding the wine, and that the defendant had *refused*, or had done something which was equivalent to a refusal, to deliver it up when so demanded. It is quite clear from this letter that a demand having been made in March, there had been such a refusal as would have enabled the plaintiff to "commence the necessary proceedings." This letter contains evidence not only of a demand, but also of a refusal. It is not however necessary that there should be an absolute refusal where there has been an absolute demand: *Topham v. Braddick (a)*, *Watkins v. Woolley (b)*. The letter contains sufficient evidence of a refusal; and a jury ought to have been instructed to presume a refusal. [*Patteson, J.* How can you presume a refusal in favour of a party who sets up her own wrong? The letter concludes with saying, that an indemnity will be given against the claims of any other party.] The claim of the assignees had been entirely set aside by the letter of December, 1826. It is impossible to fix any other period at which there was a conversion except in 1826 or the beginning of 1827. [*Littledale, J.* I should assume that the wine was bottled at the desire of the plaintiff. *Patteson, J.* It is perfectly consistent with the facts proved, that the bottling may have been by *arrangement* between all the parties.] It is submitted that the bottling of the wine, fol-

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(a) 1 Taunt. 572.

(b) Gow, N. P. C. 69.

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lowed by a drinking of a portion of it, was a conversion more than six years ago. If so there can be no subsequent conversion. [*Coleridge, J. Swayn v. Stephens* (a) is an authority to the contrary. *Patteson, J.* If a person with whom a cask of wine is deposited takes out of it a dozen of wine without the knowledge of the owner, that is not a conversion of the whole. It would at most be only a *constructive* conversion, *at the option of the owner*. The party might deliver up the part unappropriated.] In *Clendon v. Dinneford* (b), a refusal to deliver one of several things was held to be a conversion of the whole. [*Patteson, J.* I do not say that a conversion of part may not, under some circumstances, be a conversion of the whole, as *against* the party converting.]

Lord DENMAN, C. J.—It appears to me that the defendant totally failed in making out that a conversion had taken place above six years before this action was commenced. She certainly furnished *some* evidence of a conversion on which *the plaintiff* might have brought his action, if he had thought proper, at a much earlier period; but whether the jury would or not have thought that evidence satisfactory, is a question on which I cannot speculate.

In 1827 two parties claimed this wine—the plaintiff, and the assignees of *Croasdill*: and the evidence which is given by this defendant of her own wrongful conversion is a letter, written to her in November, 1827, which seems to state, in effect, that proceedings would be commenced in consequence of her declining to comply with the demand contained in a former letter. The defendant had possession of the letter. Why did she not produce it? There was no evidence of the contents of that letter, or of when the answer was written. It might have been written the very day before the new demand was made, in November, 1827, which was within six years of the commencement of the

(a) Cro. Car. 245, 333.

(b) 5 Carr. & Payne, 13.

action. It is quite possible that this may have been so. Then there is no demand and refusal at all proved beyond that period.

As to the earlier proceedings, it is quite plain that the defendant was hesitating between two adverse claims, and that she had not done any act by way of denying the right of the plaintiff altogether.

Then, with regard to the bottling off the wine, and the subsequent consumption of a portion of it. Undoubtedly those were facts that ought to have been left to the jury; and they were so left. The jury were not satisfied that there was any conversion in 1826 or the early part of 1827; and I think that they were quite right. I lament that any leave was reserved for moving to enter a nonsuit in a matter that was clearly for the jury.

LITTLEDALE, J.—It does not appear to me in this case that there is any satisfactory evidence to shew that the conversion took place six years before the commencement of the action. The wine having been deposited in the defendant's cellar by *Croasdill*, was, upon his bankruptcy, demanded by his assignees. That demand was not complied with, because, it would appear, the defendant was ignorant whether the assignees or the plaintiff had the legal property in the wine. This was nothing like a *conversion* as against the plaintiff.

Then it appears that about this period, the wine, being in the defendant's cellar, was bottled; but by whose direction, or under what circumstances, there is not a particle of evidence. There is evidence that the wine was likely to be deteriorated by being kept in the cask; and I think it is rather to be inferred that the *plaintiff* desired it to be bottled, than that the *defendant* should have done so. Even if the wine had been bottled by the *defendant's* direction, it would not have amounted to a conversion.

Then it is said that a good deal of the wine was *consumed* by the defendant. But there is no satisfactory evi-

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dence that this was done six years before the commencement of the action.

The other ground relied on is what is called the demand and refusal. It is impossible to say that the refusal to deliver to the assignees of *Croasdill* shews that the defendant claimed the wine as her own.

Then, with respect to the letter of November, 1827, which alludes to a demand in the preceding March,—we know not what that demand was; though probably it was that the defendant should deliver up the wine;—nor do we know what the answer was. The answer may have been a refusal, but couched in such language that it could not amount to a conversion. The defendant may have refused to deliver up the wine on account of conflicting claims, between which she felt herself incompetent to decide.

It does not appear to me that there was a clear conversion proved more than six years previous to the action; and therefore I think that the rule must be discharged.

PATTESON, J.—I am also of opinion that the rule ought to be discharged. The plaintiff made out his *prima facie* case by proving his demand of the property sought to be recovered in 1833, and a refusal to deliver it up. In order to make the statute of limitations apply, it was necessary for the defendant to shew that there had been an actual prior conversion or constructive conversion of the property claimed in the action, and to shew also clearly that that had taken place more than six years before the commencement of the action.

There is a case referred to by my brother *Coleridge*, in *Croke's Reports* (a), in which the Court certainly held that the demand and refusal might be evidence of a conversion, although it appeared—I believe it was stated on the record—that the ship itself, the subject-matter of the action, had been actually sold and disposed of more than six years before. The judges said they would presume that the ship

(a) *Swayn v. Stephens*, Cro. Car. 245.

had come again into the hands of the defendant after he had so sold it, and was in his hands at the time the demand and refusal took place. That was a decision by three of the judges against one. The decision savours very much of subtlety, undoubtedly; and I am not now prepared to say that if a similar circumstance were to arise, I should be disposed to hold that decision as good law. Here, it was necessary for the defendant to prove a conversion. This she tried to do in two ways; first, by shewing a demand and refusal of the same property more than six years before the action was brought;—and as to that I think she failed altogether. It is urged for the defendant that it is impossible to put any other construction on the letter of November, 1827, than that it admitted a demand and refusal to have been made in the previous month of March. It is very possible to put another construction on it, and I think another is the more reasonable construction. It is clear that the assignees of the person who had originally deposited the wine had, in December, 1826, claimed it;—that they had demanded it,—and that the defendant had refused to deliver it up to them. It is clear also that the plaintiff ordered her not to deliver it up to them, or to any one but himself; and it is clear that it was not delivered. Then what is the fair presumption? That she chooses to retain it until the rights of the parties are established. In March there appears to have been a demand; but it does not appear in what form that demand was couched, or what answer was returned. Then comes another demand by letter, in November, 1827, *within* six years from the commencement of this suit. Now it may be that the attorney who wrote this letter thought that there had been a sufficient demand and refusal; but he goes on and says, “If you will deliver up the wine now within a week, we will give you an indemnity against any other person who may claim it.” This shews clearly that the attorney thought there was some other person at that time who might claim it; and it is probable that the assignees had not foregone their claim at that time;—

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at least he thought so. Why are we to infer that the defendant had done any thing more than refuse to deliver up to *either* of the parties during all that time, from not being sure which had the right? If that be so, there was no positive refusal, and no conversion. The evidence rather leads to the conclusion that there was *no* conversion; whereas it lay on the defendant distinctly to prove it.

But then it is said that the bottling, which took place either in the end of December or the beginning of January, was of itself a dealing with the wine, and an act of ownership on the part of the defendant, and was an actual conversion. Now if the evidence had shewn that this was a dealing with the wine on her own account, and adversely to those to whom the property really at that time belonged, I am not prepared to say that it would not have been an *actual* conversion. I think it would;—but I think, according to the facts proved in this case, it was no such thing. It was done about the time when both parties were demanding the wine. It is much more like an act done for preserving the wine, until it should be ascertained to whom it belonged, than like an assumption of right in herself. I cannot possibly say that the *mere* bottling is a conversion. But then it is said that there was afterwards a *consumption* of a portion of the wine. In the first place, there is no proof *when* that consumption took place; and why are we to presume, in favour of a person who is setting up her own wrongful act to defeat the right of the plaintiff, that this took place more than six years ago? But, assuming that the act was done more than six years ago, I must say I think, as at present advised, that the mere taking away and destroying of *part* of the property which is in the hands of a bailee, is not (when the rest remains in the same state as it was before, and may be delivered up, and the party is willing to deliver it up,) such a conversion as will entitle the party to whom it belongs to maintain an action as to the whole. There is only one case that goes that length, and that is the case of *Richardson v. Atkinson* (a), referred to, of

(a) 1 Stra. 576, *suprà*, 614.

taking out some of the liquor from a cask, which was held to be a conversion of the whole; but it is to be observed that in that case there was not merely a taking out of part of the liquor, but a filling up of the cask with water, and so destroying the quality of the liquor. I do not dispute the correctness of that decision; but I am not prepared to say that if a person takes out a part of a cask of wine, and upon a demand of the cask of wine is willing to deliver up the residue of it, the person to whom it belongs can maintain trover for the whole. He ought to take that which is offered to be delivered up, and bring trover for that which has been consumed. I know of no case which has decided that the taking out *part* of the liquor from a cask, is, under *all* circumstances, a conversion of the whole, if the party is ready to deliver up that which remains. See what monstrous consequences such a decision would lead to:—Any person being disposed to commit a fraud, with respect to a cask of wine of which he is bailee, has nothing to do but to consume or destroy a small quantity of it, and that not being discovered for six or seven years, he may set up that act (although the rest is in his possession) when afterwards the rightful owner demands his wine, and refuse to deliver up the rest, because he had previously secretly converted a part to his own use. I know no law that establishes that yet, and I hope it never will be established. It seems to me that the taking out (even supposing it to have been proved that it was done more than six years ago) of the quantity here said to be taken out, was not a conversion of the whole.

A case was cited (*a*) which was decided at nisi prius, and I believe was brought before the Court afterwards (*b*), where certain letters and memorandum books, which had come into the defendant's hands, had been demanded by the party to whom they belonged, and the delivery had been positively refused; after which there was a refusal to deliver them up to a party whom the owner had sent to demand them. Afterwards the defendant promised to de-

(*a*) *Clendon v. Diineford*, 5 Carr. & Payne, 13.

(*b*) No motion appears to have been made. *Ibid.* p. 18.

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liver them up to a third person, and he delivered a portion to that third person, but not the whole, and promised to deliver up the rest. That was a question not about the destruction of part being a conversion of the whole, but whether there was a conversion,—there having been a demand of the whole, and a refusal to deliver the whole, and a subsequent promise to deliver the whole, which was not performed. If a party having a great many things in his hands belonging to me, offers to deliver up a portion of them, but keeps back the rest, having them remaining in specie,—I may say I will not take *any* unless the *whole* is given up to me; and if he does not choose to deliver up the whole, having the power to do so, I think that refusal would be a conversion of the whole. But I am not prepared to say that if a part is destroyed, the destruction of part is a conversion of the whole. I hope that will never be the case.

COLERIDGE, J.—I am quite of the same opinion as the rest of the Court; and I think, if the question in this case be properly looked at, that the stating the question almost disposes of this rule.

The plaintiff here had offered evidence of a conversion, which we must suppose had satisfied the jury. Upon this the burthen of proof lay on the other side; and certain facts were offered in evidence to shew that more than six years before action brought there had been a conversion of this property. The question is, not whether upon those facts the jury would have been *warranted* in coming to the conclusion that a conversion had been committed before the six years,—but whether they were of such a nature, and the evidence so clear, that either the learned judge was bound to tell the jury that as a conclusion almost of law, if one could so put it, they could only come to one result;—or whether, in point of fact, if they came to any other result, they were necessarily wrong in that conclusion. One act was the bottling of the wine. I admit that this bottling of the wine (particularly when you find that afterwards some

of the wine was drunk by the party)—if you had shewn the precise date when the wine was bottled, by whom it was bottled, by whose direction, and on what motive,—that this might have been a conversion of the whole; and under such circumstances the jury probably ought to have come to that conclusion. The character of that transaction is to be determined by all the circumstances of the case. We know several of those circumstances, and those circumstances serve to give it an ambiguous character. It is enough to allude to one only,—the state in which the wine was, which made it for the benefit of whoever was concerned that it should be bottled. The *drinking* afterwards is certainly a strong circumstance; but that may have been the result either of a previous intention existing at the time when the wine was bottled, or of something which arose in the person's mind when some change of circumstances took place. The jury were to determine that question.

Then, with reference to the fact of a part only of the wine having been drunk, I quite agree in what my brother *Patteson* has said—that the simple fact of drinking a certain quantity of bottles of wine out of a large quantity, the rest remaining in the person's cellar, is not necessarily a conversion of the whole of that wine. It would really come to this;—a party who had fraudulently drunk a certain number of bottles of wine, or even a single bottle, out of a larger quantity which had been deposited with him, would be entitled, at the end of six years, to say to the owner—"That which I did behind your back was a conversion of the whole: I will avail myself of my wrongful act, and you shall not recover the remainder." But do we know the time when the wine in this case was drunk? There is nothing certain in the evidence; and it was the bounden duty of the defendant to make that point clear. The affirmative lay on her the more strongly to prove it, because she was seeking to avail herself of her own wrongful act to defeat the rightful claim of the plaintiff.

Then we come to the last matter,—the supposed demand and refusal by these letters, as evidence of a conversion—

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the demand and refusal being never more than *evidence of* a conversion. Do we know all the circumstances respecting the letter of November, 1827, or the one that was lost—and in what state the parties were in at the time, so as to be able to satisfy ourselves that there *must* have been a demand and refusal? The jury have had all the facts before them; they have not been misdirected; and they have come to a conclusion which I, for one, see no reason to find fault with. That, however, is not the precise question. The only question is, whether they are *necessarily wrong*.

Rule discharged (a).

(a) The property is not altered by a conversion of goods to the use of the wrongful taker or detainer, (*Rex v. Marsh*, 3 Bulstr. 27, 29; *Prinston v. Court of Admiralty*, ib. 47,) until judgment has been recovered in respect of such conversion, (*ante*, ii. 655, n., 869, n.) It would therefore seem that no conversion, however unequivocal,

would bar the right to demand the goods, whilst they remained in specie, unless such conversion were *acquiesced in* as having changed the property; and that until destruction, acquiescence in, or judgment for, the conversion, or actual destruction of the goods, every new exercise of an act of ownership would be a fresh conversion.

—◆—
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The 9 Geo. IV. cap. 40, s. 38, does not authorize a *retrospective* order for the maintenance of a lunatic.

IN November, 1832, *Henry Beaumont* was removed to the house of *Joshua Burgess*, licensed for the reception of insane persons, by the following order:—

“To the overseers of the poor of the parish of Barrow-upon-Soar, in the county of Leicester.”

An order under that Act, stating that the party (who was not settled in the parish in which he was found,) was *so far disordered in his senses that it was dangerous for him to be permitted to go abroad*, and that the justices have adjudged that his settlement is in a particular parish, was held sufficient, although the form given in the schedule to the Act was not pursued, and the order contained no words of *present adjudication*.

&c., pursuant to an order under our hands and seals for that purpose : And thereupon we the said justices, having called to our assistance *S. Eddowes*, surgeon, and, upon examination had of him the said *H. Beaumont*, are satisfied *that he is so far disordered in his senses that it is dangerous for him to be permitted to go abroad*; and, having made inquiry into the circumstances and place of the last legal settlement of the said *H. B.*, *we have adjudged* that his said settlement is in the parish of St. Nicholas, in the borough of Leicester:—You are therefore directed to cause the said *H. B.* to be conveyed to the house of *J. Burgess*, of Great Wigston, in the said county, duly licensed for the reception of insane persons. Given &c., 29th November, 1832.”

On the 2d November, 1834, an order, directed to the overseers of St. Nicholas, Leicester, was made by the same justices; which, after reciting the maudatory part of the former order, proceeded as follows:—

“ And whereas it appears to us the said justices, that the said *H. Beaumont* was, pursuant to our said order, forthwith conveyed to the house of the said *J. Burgess*, where he now remains. We, therefore, do hereby order and direct that you, the overseers of the poor of the parish of St. Nicholas aforesaid (the legal settlement of the said *H. Beaumont* being adjudged to be in your said parish), do and shall pay the weekly sum of 18s. unto the said *J. Burgess* for the maintenance, medicine, and care of the said *H. Beaumont*, during so long a time as the said *H. Beaumont* hath been and shall be under the care of the said *J. Burgess*, the said *J. Burgess* being willing to accept such weekly sum, and which appears to us to be a reasonable charge in that behalf. Given, &c.”

These two orders having been removed by certiorari, and a rule nisi having been obtained for quashing them,

Hildyard now shewed cause. Two objections are made to the first order, and one to the second order. To the order of November, 1832, it is objected, in the first place,

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First point.
Omission of
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that it does not *formally* adjudicate in what parish the settlement of the pauper is; and, secondly, that it does not pursue the form given by the statute. And to the order of November, 1834, it is objected that it is *retrospective*.

By 9 Geo. 4, c. 40, s. 38, "upon its being made known to any justice of the peace of any county, that a poor person, chargeable to any parish or place within such county, is deemed to be insane (either by notice from the overseer of such parish or otherwise), it shall be lawful for the said justice, by an order under his hand and seal (if he shall so think fit), to require the overseer of the poor of the said parish or place to bring the said insane person before any two justices of the peace of the said county, at such time and place as shall be appointed by the said order, and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary, at the charge of the said parish or place; and if, upon view and examination of the said poor person, or from other proof, the said justices shall be satisfied that such poor person is insane, the said justices shall make inquiry into the place of last legal settlement of such insane person; and it shall be lawful for them (if they shall so think fit), by an order, under their hands and seals, directed to the said overseer of the poor, *according to the form in the schedule (5) annexed to this act (a)*, to cause the said poor person to be conveyed to, and placed in, the county lunatic asylum, and if no such county lunatic asylum shall have been established, then to some public hospital, or some

(a) *Form of Warrant.*

"Whereas it appears to us — of his majesty's justices of the peace for the county of —, having called to our assistance — a physician, or surgeon, or apothecary, (as the case may be,) that —, chargeable to the parish of — in the said county, is lunatic, insane, or a dangerous idiot, (as the case may be); you are

hereby directed to cause the said — to be conveyed to the county lunatic asylum, established at —, or to the house of —, situate at —, in the county of —, the said house being a house duly licensed for the reception of insane persons. Given under our hands and seals this — day of —. To the overseers of the poor } of the parish of —." }

house duly licensed for the reception of insane persons; and it shall be lawful for the said justice, or any other two justices of the peace of the said county, from time to time, as occasion may require, to *make order* on the overseer of the parish or place wherein such last legal settlement shall be adjudged to be *for the payment of all reasonable charges of conveying* such poor person to such county lunatic asylum, public hospital, or licensed house; and if such poor person shall be conveyed to such county lunatic asylum, or public hospital, for the payment of such weekly sum to the treasurer of such county lunatic asylum, or proper officer of such public hospital respectively, as shall be from time to time fixed upon by the visitors of such county lunatic asylum, or as may be required by the regulations of such public hospital, or if such poor person shall be conveyed to such licensed house, for the payment of *such weekly or monthly sum* to the keeper of such licensed house, for the maintenance, medicine, clothing, and care of such poor person, as such keeper shall be willing to accept, and as shall appear to the said justices to be a reasonable charge in that behalf."

By section 44, "upon its being made known to any justice of the peace that any person wandering about and at large within his jurisdiction, is deemed to be insane, it shall be lawful for such justice, by an order under his hand and seal, if he shall so think fit, to require the constable, or churchwardens and overseers of the poor of the parish or place *where such person is found*, or some of them, to bring the said person before any two justices of &c. at such time and place as shall be appointed by the said order; and the said justices are hereby required to call to their assistance a physician, surgeon, or apothecary at the charge of the said parish or place; and, if upon examination of such person deemed to be insane, or from other proof, the said justices shall be satisfied that such person is so far disordered in his senses that it is dangerous for him to be permitted to go abroad, the said justices

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shall make inquiry into the circumstances and place of last legal settlement of such insane person; and it shall be lawful for such justices to proceed in such case in the same manner as has hereinbefore been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices."

Justices are authorized to have a poor person, chargeable to any parish, who is deemed insane, brought before them, and if they are satisfied that such person is insane, they are to inquire into the place of the last legal settlement of such insane person, and they are authorized, *by an order according to the form in schedule 5 (a)* annexed to the act, to cause him to be conveyed to some house duly licensed for the reception of insane persons. Now, the form No. 5 of the schedule is silent as to the *adjudication of settlement*. It says nothing as to what is to be the *result* of the inquiry into the *settlement* of the pauper. The language of the former act, 5 Geo. 4, is different from the present statute, 9 Geo. 4, in this respect. The 5 Geo. 4, c. 71, s. 3(b), required the justices to adjudge the settlement of the pauper. The 9 Geo. 4 omits the words requiring a statement of the adjudication. All that it requires is, that the order shall be made on the officer of the parish in which the pauper is found to be settled. No formal words of adjudication are requisite. As to the second objection; the form given in the act is pursued so far as the circumstances of the case would allow.

Second point.
 Deviation
 from form of
 order given in
 schedule to
 the act.

Third point.
 Order retro-
 spective.


With regard to the objection to the second order; *Rex v. Maulden* (c) certainly decided that so much of an order of this description as was *retrospective* was bad, and that it was good for the residue. But that decision turned on the words of 5 Geo. 4. The words of the 9 Geo. 4 do not require that the order shall be prospective only. By section 38, any two justices are authorized from

(a) *Ante*, 626, (a).

(c) 2 Mann. & Ryl. 146; S. C.

(b) Repealed by 9 Geo. 4, c. 40. 8 Barn. & Cressw. 78.

time to time, as *occasion may require*, to make an order on the overseers of the parish in which the insane person shall be adjudged to be settled, for the payment of all reasonable charges of conveying the poor insane person to the lunatic asylum, or licensed house, and, if he shall be conveyed to such asylum, &c., may make an order for the payment of a weekly or monthly sum for the maintenance, &c. of the poor insane person. This enactment appears evidently to contemplate the creation of a power in the justices to make orders for the payment of expenses *previously* incurred on account of the poor insane person. Under 5 Geo. 4, c. 71, the same magistrates who adjudicated the settlement, must make the order of maintenance, and the order for payment is to be made *forthwith*. But according to 9 Geo. 4, an order of maintenance *may be made from time to time* by any two justices. By sect. 42 of 9 Geo. 4, c. 40, where the settlement of the lunatic has not been ascertained, any two justices may make an inquiry as to his settlement, and if satisfactory evidence can be obtained as to such settlement, may make an order upon the overseer of the parish where *such settlement of such insane person* shall be adjudged to be, for the repayment of the charges of maintaining the insane person, *incurred within twelve calendar months* previously to the date of the order.

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Archbold, *contra*. As to the objection to the second order; the 42d section of 9 Geo. 4, c. 40, only applies where the settlement of the lunatic was not ascertained in the first instance. Here, it appears that the settlement was ascertained previously to the making of the order. The 38th section is the only clause applicable to this case, and in that section the whole mode of proceeding is comprised. All that that section authorizes the justices to do is, to fix a sum to be paid *in future* to the keeper of the lunatic asylum. It does not authorize the justices to make a *retrospective* order. [Lord Denman, C. J. intimated that the Court were satisfied that the order was bad for this reason.]

Second point.

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First point.

The first order is bad, because it is not in the form (a) prescribed by No. 5 of the schedule to 9 *Geo.* 4. [*Coleridge*, J. Suppose a party is neither a lunatic, nor insane, nor a dangerous idiot, in what form ought the order then to be made? The 44th section appears to suppose a *fourth* case.] The warrant must either contain an adjudication, or be in the form given by the act. The form of proceeding in the 38th section must be pursued. From the judgment of Lord *Tenterden* in *Rex v. Maulden*, it would appear that he considered it necessary that the order should contain an adjudication; and it was held, that the words "having adjudged" (which the order in that case contained) were, under the circumstances, used in the sense of "do adjudge." [Lord *Denman*, C.J. That was the answer which Lord *Tenterden* gave to that case. It does not follow that he would have considered an adjudication essential if the words "having adjudged" had been omitted.]

LORD DENMAN, C. J.—It appears quite plain from the terms of the act, and from the judgment of Lord *Tenterden* in *Rex v. Maulden*, that a *retrospective* order cannot be supported; because by the act of parliament the power is only given to make an order for *future maintenance*. But with regard to the first order, there is, in my opinion, no valid objection to it. It proceeds on the 44th clause, which enacts, (his lordship here read sect. 44, which see *ante*, 627.) The justices are authorized to proceed in the same way with regard to the persons to whom that section relates, as had been directed by the 38th section. Now, according to s. 38, which refers to the schedule No. 5, there are only three descriptions of persons, viz. persons who are lunatic, insane, or dangerous idiots, for whose maintenance an order is authorized to be made; and the 44th section introduces a new description, viz. a person so far *disordered in his senses*, that it is dangerous for such person to be permitted to go abroad. In such a case section 44 requires the order

(a) See *ante*, p. 626, note (a).


to be made in conformity with the form given in the schedule No. 5, which is referred to by section 38. As section 44 requires the order to be made according to the form in the schedule, it must necessarily introduce into the meaning of the words of the form that new description of persons. The order in this case does not say, in the precise language of the form in schedule 5, that the party is a lunatic, insane, or dangerous idiot. Probably it would have been more correct to have introduced that form of words. The form, however, is sufficiently complied with when, in every other respect, the order follows the language of the schedule.

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LITLEDALE, J.—I am entirely of the same opinion. By section 44, (which relates to persons not chargeable, whereas section 38 relates to poor persons chargeable to any parish), this person is brought within the jurisdiction of the justices; for it appears that he was a person wandering about and at large, and deemed to be insane, and not chargeable to any parish, and that he was brought before the justices, and was found to be so far disordered in his senses that it was dangerous for him to be permitted to go abroad. The justices are also to inquire as to the settlement of the party. This they have done. By section 44, therefore, the justices have jurisdiction, and they are to exercise that jurisdiction in the manner therein pointed out. An objection is made to the form of the order, but it exactly pursues the form given in schedule 5, except where that form is adapted to a person who is lunatic, insane, or an idiot.

PATTESON, J.—I am of opinion that the rule must be made absolute, so far as regards quashing the *prospective* part of the second order. The first order appears to me to be good. The objection to the first order, as to the adjudication of settlement, is answered by Lord Tenterden in *Rex v. Maulden*. We must construe the words "have adjudged" as if they were "do adjudge."

With regard to the objection as to the *form* of the order, Second point.

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we must look at section 38 coupled with section 44. It is evidently intended that, when a party, deemed insane, is wandering abroad, the justices should proceed in the manner pointed out in section 38, and that the form of order should be such as would apply to the circumstances of the case. In the form given in the act, the words "as the case may be" are inserted after the words "lunatic, insane, or idiot." I do not mean to say, that if the order, in this case, had used the word "insane," it would not have been good. Looking at section 44, the legislature seem to have used the words "a person being so far disordered in his senses that it is dangerous for him to go abroad" as a definition of the insanity; for section 44, after directing an examination whether a person is so far disordered in his senses, that it is dangerous for him to be permitted to go at large, goes on to say, that the justices shall make inquiry into the settlement of such *insane person*.

Third point. As to the *retrospective* part of the second order, *Rex v. Maulden* is directly in point, and this cannot be distinguished from that case.

First point. COLERIDGE, J.—I am of the same opinion. Two objections have been made to the order of November, 1832; of which the first is, that it does not follow the form in the schedule in the act. If the words of section 44 are examined, it will be found that there is nothing there said which makes that necessary. The act only directs that the parties shall proceed in the same manner before directed, in the case of a person chargeable to any parish. Then, when section 38 (which applies to persons chargeable) is looked at, the only direction there is, that *it shall be lawful* for the justices to make an order according to the form in the schedule, not that they are *always* to make use of that form, but they are to frame the order *according* to that form. It never can be contended that the very words of the form are to be used. The form states that the person is chargeable to the parish, without any restrictions with

reference to the 44th section. It never could be the intention of the legislature, that a form untrue in fact should be used. The form in the schedule contemplates persons lunatic and insane, and idiots. A person not fit to walk abroad may be insane, but the 44th section, in my opinion, applies to a different class of persons from those described in section 38. The first objection, therefore, cannot be sustained.

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The other objection is, that there is no adjudication of the settlement. The first order is not directed to the parish to which the person is *to be removed*, but to the officers of the parish where the party is *found*. The words "have adjudged" may be construed to mean "do adjudge;" but surely if these words could not bear this meaning, yet as the section does not direct in what manner, or when, or where, an adjudication of the settlement is to be made, it would be quite sufficient for the justices to say "we *have* adjudged" that the settlement is in a particular place.

I quite agree that the second order is bad, in so far as it is retrospective.

Second order quashed, so far as relates to payments in respect of a by-gone period.

DEWAR V. PURDAY.

CASE, for infringing the plaintiff's copyright in the music of a song, called "The Old English Gentleman," should either be discharged or directed to deliberate further. The judge cannot, without the assent of the plaintiff, direct a nonsuit.

In no case can a plaintiff be nonsuited against his will.

Where liberty is reserved to move to enter a nonsuit, such reservation proceeds upon the *assent*, express or implied, of *both parties*, to such reservation.

A defendant insisting that the plaintiff has failed to prove a material fact, the judge gives him leave to move to enter a nonsuit upon the objection taken, and the cause proceeds. The jury disagreeing in their verdict, the judge has no power, without the further assent of the plaintiff, to direct a nonsuit.

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tried before Lord *Denman*, C. J., at the sittings for Middlesex after Trinity term, 1834. After the plaintiff had closed his case, the defendant's counsel applied for a nonsuit, on the ground that there was no evidence to go to the jury in support of the statement in the declaration, that the plaintiff was the *author of the music*. The Lord Chief Justice refused to stop the cause, but gave the defendant leave to move to enter a nonsuit. The trial proceeded, and conflicting evidence was given as to whether or not the music had been *recently composed*, or was merely an old air *revived*. The learned judge summed up the case, and the jury retired to consider their verdict, and were in deliberation about sixteen hours. When the jury came into Court the next morning, they intimated to the Lord Chief Justice that they could not agree. Upon this his Lordship considered that two courses were open to him,—either to discharge the jury without the consent of the parties,—or to act upon his first impression, which he now considered correct, and *nonsuit* the plaintiff. He adopted the latter course as the smaller evil, and directed that the plaintiff should be nonsuited, which was done in the absence of the plaintiff's counsel. A rule nisi having been obtained in last Michaelmas term for setting that nonsuit aside and for a new trial,

Sir *W. Follett* and *Crompton* now shewed cause. [Lord *Denman*, C. J. Can what was done on the second day be supported? was not the proper course either to discharge the jury, or to keep them until they agreed? The only question, I think, must be whether the parties are not now in the same situation as if a motion had been made by the defendant to enter a nonsuit, pursuant to the leave which was originally reserved to him.] The parties *are* in the same situation. If the verdict had been for the plaintiff the defendant would have been at liberty, by reason of the leave given, to move to enter a ~~nonsuit~~. The only question therefore is, whether or not there ought to be a nonsuit. There was no evidence to shew the *originality* of the composi-

tion. The only evidence given was, that one copy was in the *hand-writing* of the plaintiff. It is no answer to say that the plaintiff, when he was called, would have appeared. Where a point, which occurs at the trial, is reserved for the consideration of the Court, the parties in fact *consent* that the Court shall stand in the situation of the judge at the trial. The plaintiff having, in one stage of the trial, consented to have that question reserved, could not have subsequently appeared when called. To nonsuit the plaintiff was the most convenient course, and that nonsuit was right, as there was no evidence to go to the jury.

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Campbell, A. G., in support of the rule. It cannot be considered that there was *no evidence* to go to the jury. After a prolonged trial, the jury retired to consider their verdict. They differed in opinion, and the learned judge, instead of *discharging* the jury, directed the plaintiff to be called. The plaintiff could not legally be called. A plaintiff, is not supposed to be in Court when the jury are deliberating; he is only to appear in Court to hear the verdict. There is a form of the record of a nonsuit in *Tidd* (a), which shews that this is the case. Had no right therefore been reserved to the defendant to move to enter a nonsuit, the plaintiff could not have been called. Does it then make any difference that such a right had been reserved? This power of reserving questions for the consideration of the Court is by *consent* of both parties. The plaintiff may, if he pleases, refuse to consent. He may appear and tender a bill of exceptions. The consent in this case *was* given by the plaintiff, but upon the *condition* that the trial should *proceed*. Consequently, this consent did not give the learned judge authority to stop the trial. But it is said that the parties are both *in the same situation* as if the trial had proceeded, and a verdict had been found for the plaintiff. This is not the case. If the verdict had been found

(a) *Tidd's Forms*, sixth edition, 370, 371.

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for the plaintiff, the defendant might have moved to set that verdict aside and enter a nonsuit; but if in that case it had turned out that in the opinion of the Court there was evidence to go to the jury, the *verdict* would have stood. In the present position of the cause, all that the plaintiff can have is a *new trial*.

LORD DENMAN, C. J.—I was at first of opinion that the plaintiff could have been in no better situation, assuming that the verdict had been in his favour, and that this was a motion pursuant to the leave reserved. But the Attorney-General has convinced me that this rule must be made absolute generally. It is perfectly clear, when it comes to be considered, that when the plaintiff is required to be nonsuited, it is at his option to appear or not to appear, and he may, if he pleases, dispute what is then going forward. What took place on the first day of this trial is the ordinary mode in which, by the *general understanding* of all parties, a plaintiff must be taken to *agree* to be bound by the future opinion which the Court (who are placed in the situation of the judge at the trial), may afterwards form on the evidence then before the jury; and most undoubtedly the plaintiff has a right to say at the trial, “the consent that I give to be so bound, is a consent having relation to the state in which I now stand, and on condition that the case is now proceeded with. If the learned judge at the trial thinks fit to proceed with the case, I have no objection to submit to the nonsuit in the event of its afterwards appearing to the Court that the objection taken ought to prevail.” And he has the right to reserve to himself, subject to that contingency, the chance of the verdict to which the jury may come. It seems to me, that in this case, what took place on the second day deprived the plaintiff of that chance; and that therefore he is entitled now to be placed in the same situation as if even the conditional consent not to appear had never been given.

LITTLEDALE, J.—I am entirely of the same opinion. I think the plaintiff's consent was given on the supposition that the jury were to give a verdict one way or the other.

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PATTESON, J.—I must own I think that is the right view of the case. It is reserved for the Court to determine whether or not there shall be a nonsuit; but, subject to that question, there should be a verdict one way or the other. Can the plaintiff be deprived of the right to require that a verdict should be returned? Even supposing the jury had been *necessarily* discharged, the same consequence would have followed.

COLERIDGE, J.—I am quite of the same opinion. The only question in my mind was, whether what had passed on the first day of the trial was by *consent* of the plaintiff. I now think that it was by his *consent*, and that it was a *conditional consent*; and that if the condition was not complied with, then he stood on his *common law right*. His common law right was to have the verdict of the jury on the facts, and if he pleased, the opinion of the judge expressly on the law of the case, so that he might take it to another tribunal, if he thought fit. He waives that benefit by a *conditional consent*, and that *condition* is not complied with.

Rule absolute.

UDALL v. NELSON.

THE defendant was arrested for 27*l.*, due upon a bill of exchange, and gave bail to the sheriff. A few days before the arrest, the plaintiff had signed an agreement, by which he consented to allow the defendant to pay the debt within a period of six months, by instalments of 5*l.* per month; the first instalment to be paid on the 4th of May. The Court will not discharge a defendant out of custody on the ground that the plaintiff caused him to be arrested after he had consented to give him time, which has not elapsed, to pay the debt.

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first instalment, which became due after the arrest was made, had been tendered to the plaintiff, but he refused to receive it.

G. F. Jones now moved for a rule to shew cause why the bail-bond given to the sheriff of Middlesex should not be delivered up to be cancelled, and the defendant discharged out of custody, on entering an appearance. He contended that as the arrest was contrary to good faith and the express agreement of the plaintiff, the defendant was entitled to call upon the Court to interfere.

The COURT refused the rule (a).

(a) A promise, without any new consideration, to give time for the payment of a pre-existing debt, is not binding, per *Eyre, C. J.*, in *De Symons v. Minchwich*, 1 Esp. N. P. C. 430; and per Lord *Ellenborough, C. J.*, in *White v. Jones*, 5 Esp. N. P. C. 160.

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LEMPRIERE v. HUMPHREY.

In a declaration in trespass quare clausum fregit, the plaintiff's close is described by *abuttals*; plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant also has a close answering to the same description.

So, although the abuttals are stated with such generality that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description.

As where the locus in quo is described as abutting, in the direction of the four cardinal points, *towards* certain closes, and the plaintiff proves a trespass on a close of a *triangular* shape abutting *towards* such closes.

When in a declaration in trespass quare clausum fregit, the *locus in quo* is described as abutting *towards* certain closes, the defendant may demur specially, or may obtain a judge's order for a more certain description of the close.

But such defect cannot be taken advantage of at the trial of an issue raised upon a plea of seisin in fee or liberum tenementum.

Nor could the objection have been taken though the defendant had pleaded in denial of the plaintiff's possession of the alleged close. *Semle.*

Sussex, *towards* the north on certain land, on the east on premises in the occupation of the plaintiff, and on the west *towards* premises in the occupation of the defendant, and situate in the county aforesaid."

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Plea: that the close in which &c. is a customary tenement of the manor of H., demised and demisable, &c.; and that long before the time when &c., to wit, on &c., the lord of the manor granted the said close to the defendant and his heirs for ever, at the will of the lord, according to the custom of the said manor; and that long before the time when &c. he had entered by virtue of this grant, and had become seised thereof in his demesne as of fee at the will of the lord, according to the custom of &c., and continued so seised at the time when &c. Wherefore &c.

Replication: that the close in which &c. is not, nor at the time when &c. was a customary tenement of the said manor demised and demisable, &c. Whereupon issue was joined.

At the trial before *Littledale, J.* at the Summer assizes for Sussex, in 1834, it appeared that the alleged trespasses had been committed over the whole of a piece of land which corresponded with the abutments stated in the declaration.

It was, after evidence given, admitted on the part of the plaintiff, that of this piece of land, the greater part forming a plot of ground answering to the description in the declaration, was the customary tenement of the defendant. The remaining portion was a triangular plot answering also to the description as far as a three-sided figure could correspond with that description. This smaller portion would have failed to correspond with the description in the declaration, if the close in which &c. had been described as abutting on the south, "*on*" the highway in the parish of Hurstperpoint, or, on the west, as abutting "*on*" the premises in the occupation of the defendant. The defendant's counsel contended that he was entitled to apply the evidence of the trespass

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to the plot of ground so proved and admitted to be *his*, and that, therefore, the plaintiff ought to be nonsuited. The learned judge, however, refused to nonsuit, but (reserving to the defendant the right to move this Court for a nonsuit, in case the verdict should be found against him) directed that the trial should proceed, in order that the right to the smaller piece might be determined. The trial went on, and the jury found a verdict for the plaintiff. *Platt*, in Michaelmas term, 1834, obtained a rule nisi to enter a nonsuit; against which,

Thesiger now shewed cause. The defendant has not pleaded the general issue, but a plea which admits that the abutments are correctly stated. [*Patteson, J. In Cocker v. Crompton* (a) the declaration stated a trespass on the plaintiff's close called *the Foldyard*, situate in the parish of A.: the defendant pleaded *liberum tenementum*, on which the plaintiff took issue without newly assigning. At the trial it appeared that the plaintiff had a close called the "*Foldyard*," in the parish of A., upon which the trespasses were committed; but it appearing that the defendant also had a close in A. called the "*Foldyard*," his counsel contended that he was at liberty to apply the evidence to *his* close, and that, therefore, the plaintiff ought to be nonsuited. The point having been reserved, this Court decided, upon a motion for a nonsuit, that the defendant was not entitled so to apply the evidence. That case differs, however, from this, because the description here is utterly wrong.] Where a party justifies the act done, as in this case, he admits the abutments. It has been held, that a declaration, in the statement of abutments, is not to be construed strictly, and that the word "*towards*" may be used in setting out the abutments of a close. The defendant was not actually misled by the description in the declaration, as he came prepared with much evidence as to the right to the smaller piece of ground. Can he now come to this Court and ask for a

(a) 2 Dowl. & Ryl. 719; 1 Barn. & Cressw. 489.

nonsuit, after having acted as if he was satisfied with the description? [*Littledale, J.* 'The defendant's counsel is not precluded from taking this objection, by trying the cause.] *Cocker v. Crompton* establishes that where a close is set out *by name* in the declaration, and the defendant justifies the trespass, he cannot at the trial apply his evidence to another close of the *same name* as the one mentioned in the declaration, which may happen to be his own property. It can make no difference whether the close is described by *name* or by *abuttals*. Assuming, therefore, that the abuttals in this declaration were correct, it was not competent for the defendant to apply the evidence to a close of his own answering to the abuttals in the declaration. But it is said that the abuttals in this declaration are incorrect. By Reg. Gen. H. T. 4 *Will. 4*, (a) TRESPASS I., it is ordered that "in actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name, or abuttals, or other description; in failure whereof *the defendant may demur specially*." Here the defendant has lost the opportunity of taking advantage of this defect, and could not at the trial have claimed to enter a nonsuit. [*Lord Denman, C.J.* The description is not *apparently* absurd or insufficient. It is only upon its appearing at the trial that there are two places answering to the description in the declaration that the objection arises.] If the defendant had in fact been *misled*, there might have been some ground for this objection at the trial; but there is no ground for it as the case stands.

Platt and Hollist, *contra*. The evidence brought forward at the trial was applicable to the larger plot of ground. The whole of the argument on the other side proceeds on the supposition that there are two plots of ground which answer to the description and the abuttals mentioned in the declaration. This is not the case. The smaller piece

(a) *Ante*, vol. iii. p. 9.

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is *triangular*. By the description in the declaration a *four-sided* figure is pointed out. The description of the larger piece does not correspond with the smaller. The verdict will be evidence of title against the defendant. He will, therefore, sustain an injustice if this rule be not made absolute.

Lord DENMAN, C. J.—In this case the plaintiff has given a description *by abutments* of the land on which he says that the trespass was committed, which description is certainly not satisfactory. The defendant justifies the act of trespass which he has done, by saying that the close was his, as a customary tenant of a certain manor. The parties go to trial, and the defendant there says, “I claim to shew that the description given by the plaintiff in his declaration is one which includes my land; and that not merely as answering to the same description, but as forming a part of that land on which, the plaintiff says, the trespass was committed.” The trial proceeds with a protest of the defendant, that he cannot be bound by this issue, and leave to raise the objection is reserved to him. The question is, whether the objection is well founded, and whether the trial was properly allowed to proceed, or whether the defendant, proving a customary tenement to be held by him answering the description in the declaration, is entitled to a verdict. Upon considering the cases, and the present, and also the former rules of pleading (which, in this respect, do not appear to be disturbed), it appears to me that the defendant is bound by the description in the declaration which he himself has adopted, and under which he has justified. If the defendant found the description to be insufficient, the course for him to have adopted is that which is pointed out by the new rules. He should have *demurred* specially to the declaration; but having pleaded as he has done, the case is brought within the authority of *Cocker v. Crompton*.

The defendant might have prevented this matter from going to trial if he had thought the description uncertain;

A plea of *seisin in fee* or *liberum tenementum in trespass*, admits the plaintiff's possession in *fact* of a close corresponding with the description of the close (either by name or by *abutments*) in the declaration.
Semle.

but after having treated that description as sufficiently certain, it is not now open to him to object that the description applies equally to his own close, any more than it would be if the description had been, not by *abuttals*, but by *name*.

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LITLEDALE, J.—I am entirely of the same opinion. Suppose the defendant had a piece of land which was bounded on the north by arable land, in the possession of *A. B.*; on the east by meadow land in the possession of *C. D.*; on the south by pasture ground in the possession of *E. F.*; and on the west by wood land in the possession of *G. H.*; and that the plaintiff in his declaration had thus described the close in which he complained of the trespass having been committed, and the parties had gone to trial on that, and the defendant had proved that he had land corresponding in every particular with that described in the declaration. It is quite clear, then, the case would have fallen within the rule in *Cocker v. Crompton*,—where, instead of a description *by abuttals*, it was *by name*,—for the defendant would have admitted the plaintiff's possession of the land described in the declaration.

This case, however, is rather different, because, in point of fact, although the defendant has proved that he has a customary tenement corresponding exactly with the description of the plaintiff's close, it seems from the evidence that the *plaintiff* does not make out the description altogether. It is, in the first place, described by the *evidence* as *triangular*, whereas in the declaration it would seem to be a four-sided figure. In the next place, it is not described by the witnesses as *abutting on* the road, which the defendant's does. It seems to me, however, that the defendant, for the purpose of these pleadings, must be taken to have admitted that the plaintiff was in possession of such a piece of land as he has described in the declaration. If the *abuttals* had been wrong, the defendant might have pleaded the general issue, and have gone to trial, and if the

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plaintiff had not proved the statement in the declaration he would have been nonsuited. On these pleadings (there being no general issue), the defendant must be taken to have admitted the plaintiff's possession of a piece of land corresponding with the close described in the declaration. The defendant says, "I admit the possession of the close in which &c." The close in which &c. is that close which is designated by the description contained in the declaration; and, therefore, it seems to me that the defendant cannot avail himself of this objection on these pleadings.

PATTESON, J.—I am also of opinion that this rule must be discharged, and that, on the authority of *Cocker v. Crompton*. I am not at all sure in this case that the plaintiff has not succeeded merely by the effect of putting in that word *towards*, which seems to me to be a very improper word of description. The defendant would, I think, have been entitled either to demur to this declaration, or to apply to a judge at chambers to have the abutments more specifically pointed out. But he has *adopted* the description, and he says that *he* has a close answering that description. Now, taking the words in their general sense, both the closes in question do answer the description, because taking the words "*abutting towards*" not to mean *abutting on*, the plaintiff's triangular piece does abut on the south, *towards* the highway. It is true that a triangular piece cannot distinctly be said to have four abutments; but then we know that, in several cases, the Court have not been very strict in looking at abutments so far as relates to the points of the compass.

Here is no plea of the general issue (which would have been the course before the new rules);—there is no plea *denying* the possession of the plaintiff (which is the course prescribed by these rules). If there had been, the case would have been very different, that is, supposing the abutments had been properly described. If this declaration had stated that the close abutted *on* the high road (as it ought

to have done), and the defendant had pleaded that *the plaintiff was not in possession*, the plaintiff must have failed, on the ground of a variance, because he would not have shewn possession of any close answering the description in the declaration. If the defendant had so pleaded to this declaration *as it now stands*, I do not know that the same consequence would have followed, because the description is, abutting *towards* the highway; and, perhaps, the close in question *does answer that* description. The defendant ought, therefore, either to have demurred, or to have applied to a judge at chambers. By pleading *liberum tenementum*, the defendant admits that the plaintiff is in possession of a close, such as is described in the declaration, and then he says "*that is my soil and freehold.*" Whether the land is described in the declaration by name or by abutments, the case of *Cocker v. Crompton* equally applies, and the defendant is not at liberty to apply his evidence to a different close which *he* has in the same parish answering the same description, whether it be in *name* or *abutments*. If so, of course the evidence here ought to have been applied, and must be applied to that of which the defendant has, by his plea of *liberum tenementum*, admitted the plaintiff to be in possession. I do not mean that the defendant has admitted the plaintiff to be in *rightful* possession, because then the plea of *liberum tenementum* would be absurd; but by that plea I understand the defendant to admit the plaintiff to be in possession of *the place* mentioned in the declaration, although wrongfully in possession. On this ground it appears to me that this case is not distinguishable from *Cocker v. Crompton*.

COLERIDGE, J.—I am of opinion that the rule must be discharged, on the authority of *Cocker v. Crompton*. That case has been since acted upon in this Court in *Cooke v. Jackson* (a). The only difference between these two cases is one which makes the latter rather a stronger authority

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and nearer the facts of this case. In *Cooke v. Jackson* the trespass was for breaking and entering the plaintiff's close called *Broadmead*. Plea: *liberum tenementum*; and issue thereon. At the trial, it appeared that each party had a close called *Broadmead*. So far the cases are precisely the same. I collect from the judgment of Lord *Tenterden*, that both the closes called *Broadmead* were parts of one district; they were parts of a whole, which is very like the facts in the present case. It was attempted to distinguish *Cooke v. Jackson* from *Cocker v. Crompton*. Lord *Tenterden* says, "Two points have been settled in cases of this description; first, if the plaintiff, in a declaration of trespass, names his close, and the defendant pleads *liberum tenementum* generally, he cannot, by shewing that he himself is possessed of a close of the same name, and in the same ville, turn the plaintiff round and prevent him proving a trespass in his own close; and secondly, that when there is a general district of land known by one general name, and there are certain occupiers in the same district, each party may call his own part of the district by the general name. Here, the plaintiff has a part of the district called *Broadmead*, and he has the right to call his close by the name of *Broadmead*. The defendant also has a close called *Broadmead* in the same district, and he also has a right to call his close by that name, but that would not prevent the plaintiff, without a new assignment, from going into evidence to shew that the two closes are not connected one with another." Therefore there is that little distinction between the two cases, which, I think, makes *Cooke v. Jackson* stronger on this point. What is the principle, then, that is to be collected from these two cases? That if the plaintiff, in his declaration, gives a proper and accurate description of his close by name, the defendant shall not, in that case, by pleading *liberum tenementum*, put the plaintiff to that inconvenience of the new assignment which he may bring on himself by merely pleading that his close, without naming it, in a particular ville, was broken and en-

tered. If that would be so, with regard to a description by name, what difference in point of principle can there be if the plaintiff describe his close *accurately* by abutments. If the plot of land in this case had been clearly and properly described by abutments, no objection could have been raised against what has been done. But it is said, that this is an *inaccurate description*; and, undoubtedly, looking at the description by itself, it is an incorrect and insufficient one. But we must consider the sufficiency of the description as it stands on the record, between the two parties. The question is, whether *this defendant* can now say that this description is incorrect. He says to-day—this description is such that nobody can know the close by it—but he has stated on the record, that *that* close, so described in the declaration, is a close belonging to him. He admits, consequently, on the face of the record, that there is a sufficient description of the same close.

Then he brings himself into precisely the same situation as if there was no apparent defect in the declaration in the statement of the abutments. If he brings himself into that situation, all the consequences follow that would have followed if the description had been perfect on the face of it, which, in my opinion, must be the same when the description is by *abutments* as when it is by *name*. I therefore think that this rule must be discharged.

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Rule discharged (a).

(a) The plea of *liberum tenementum* (which neither traverses, nor confesses and avoids, the plaintiff's possession,) appears to have been allowed formerly in those cases only where it was used as a *common bar*, i. e. as a means of compelling the plaintiff to specify his close either by name or by abutments, when it was not so identified in the declaration. The difficulty in the present case appears to have arisen

principally from the plea of *liberum tenementum* being adopted in a case where (except as against a special demurrer) the abutments were sufficiently stated in the declaration. This improper extension of the use of this anomalous plea was sought to be put down by the rules of the Upper Bench, made in 1654, by which it is ordered (sect. 12), that, "for the avoiding of the common bar and new assignment, the decla-

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ration upon an original quare clausum fregit may mention the place *certainly*, and so prevent the use and necessity of the common bar and new assignment." And by sect. 16, "The common bar and new assignment is to be forborne where certainty is contained in the declaration equivalent to a new assignment." After the Restoration, however, the judges, considering that the correction of these and other abuses had emanated from an usurped authority, restored, amongst other things, the latin pleadings and the common bar.

In a declaration, it is sufficient if it appear that the plaintiff has such an interest in the subject-matter of the complaint as will entitle him to maintain an action. Thus, in trespass quare clausum fregit, which is an action brought for an injury done to the *possession*, a description of the close in which the act was done, *as the close of the plaintiff*, is sufficient. So, in an action for an injury done to the *freehold*, as in writs of entry en nature d'assise (P. 33 H. 6, fo. 14, pl. 5,) or of entry sur disseisin (2 Saund. 30,) the proper and formal course is to allege that the plaintiff is seised *ut de libero tenemento*, without specifying the nature of the estate of freehold. So, in covenant upon a lease, the declaration may begin with a quod cum dimississe, (*Taylor v. Needham*, 2 Taunt. 278; *ante*, 50 (e),) shewing no title beyond the *implied* assertion that the lessor, at the time of the demise, had a sufficient estate to enable him to make such demise. So, in formedon in the descender, it is sufficient for the plaintiff to say, that J. S. gave the land to his an-

cestor in tail, without directly saying that J. S. was "seised, and gave;" *per Vampage arguendo*, and admitted by the Court, M. 10 H. 6, fo. 21 b. and again in M. 15 H. 6, fo. 26 a. *The Baron of Dudley's case*; *Abbot of Beham v. Prior of Michelham*, T. 34 H. 6, fo. 48, pl. 14. So, in an avowry, in which the avowant seeks to recover, through the means of a judgment of retorno habendo, the rent or damages for which he might have sued in debt or trespass, (*ibid.*) and which is, therefore, said to be in the nature of a declaration (Co. Litt. 302).

But in a plea in bar setting up title, and resting upon matter in *excuse*, the rule is, that the title set up must be deduced from a party seised in fee. (*Abbot of Beham v. Prior of Michelham*, *ubi suprâ*).

Though from analogy to declarations, no title need be set out in an avowry, it has been held, that an avowant for taking cattle damage feasant, cannot, like a plaintiff in trespass, rest his case upon mere possession. He is, however, allowed to say that the close in which &c. was his freehold, without specifying the nature of his estate, (1 Wms. Saund. 347 d, n. (6).) This appears, at first sight, to be analogous to the plea of liberum tenementum in trespass. But it should be remembered that in the latter case the pleader is a defendant, justifying a trespass, not by matter in *excuse*, but by matter of *title*; whereas in the former case the avowant is in the situation of a *plaintiff* in trespass.

It is observable that the two cases (*Rickman v. Cox*, Cro. Jac. 594; and *Anon.*, Dyer, 23 b.) which the counsel, who moved for a new

trial in *Cocker v. Crompton*, admitted to be authorities against the application, were cases in which the defendant had anticipated a new assignment by setting out the name or other description of the close in

his plea of *liberum tenementum*, and that the decisions in these cases proceeded upon this ground, which, in the case of *Cocker v. Crompton*, did not exist.

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PATTESHALL v. TRANTER.

ASSUMPSIT on a warranty of soundness on the sale of a horse. The cause was tried before *Park, J.*, at Hereford, when these facts appeared:—The defendant had sold the horse with a warranty of soundness, it being at the time unsound. Shortly after the sale the plaintiff discovered that the horse was unsound, but without giving notice to the defendant, kept the horse nine months, during which period he had given it physic, and used other means to cure it; he had also cut the horse's tail. The plaintiff then offered to return the horse, which was refused by the defendant. For the plaintiff, it was insisted that he was entitled to recover the difference between the value and the price given. Upon this state of facts the learned judge nonsuited the plaintiff. *Ludlow, Serjt.* having, in the ensuing term obtained a rule to set that nonsuit aside, and for a new trial,

Where an unsound horse is sold with a warranty of soundness, the purchaser may maintain an action on the warranty, although shortly after the sale he discovers the unsoundness, and without giving notice of that fact to the seller, keeps and uses the horse for nine months as his own, and during that time administers physic to it, and uses other means to cure it.

F. V. Lee now shewed cause. It must be admitted that the old case of *Field v. Starkin* (a) is directly opposed to the ruling of the learned judge; but it is questionable whether that authority has not been overruled by subsequent decisions; or whether, supposing that not to be the case, the Court will now feel themselves bound by it. In *Adam v. Richards* (b), it was held, that where a horse is sold with an express warranty of soundness, &c., accompanied with a stipulation that the vendor shall take the horse back again, and return the purchase-money, if on trial the horse

(a) 1 H. Bla. 17.

(b) 2 H. Bla. 573.

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should be found to have any of the defects mentioned in the warranty,—it must be returned *as soon as any of those defects are discovered*, in order to entitle the purchaser to maintain an action on the warranty. There seems to be no difference, in respect of the principle which is involved in the present inquiry, whether the horse be sold with an *express warranty* only, or whether it be sold with an express warranty, accompanied by express stipulation that the vendor shall take back the horse, and return the purchase-money, if on trial the horse should prove defective; that is simply the legal effect of the warranty, and, if so, *Adam v. Richards* is not to be distinguished from *this case*. And though it should be thought that the cases are distinguishable, yet it is difficult to see how the later case can be reconciled with the principle upon which Lord *Loughborough* and the rest of the Court put the decision in the earlier case, which was,—that no length of time elapsed after the sale, will alter the nature of a contract originally false; and that to support an action on an express warranty, it is not necessary for the plaintiff to return the horse. The same observation applies to the case of *Street v. Blay* (a), in which it was held, that a person who purchases a horse warranted sound, sells it again at a profit, and then re-purchases it,—cannot on discovery, even within a week afterwards, that the horse was unsound at the time of the *first* sale, require the original vendor to take it back again. If the principle of law be that which is laid down by Lord *Loughborough*, *Street v. Blay* cannot be supported, and therefore it must be considered as having overruled *Fielder v. Starkin*, to which the attention of the Court was called in the argument. *Parke, J.*, in the course of the argument, alluding to the transactions intermediate between the original sale and the returning of the horse, says, “according to the general rules on the subject of warranty, a vendee is bound to return the article as soon as he discovers the unsoundness; and he ought not, by let-

(a) 2 Barn. & Adol. 456.

ting it out of his hands, to delay the return." This observation, and the judgment of the Court, involve a contradiction of the principle laid down in *Fielder v. Starkin*. So with regard to the case of goods sold by sample. Thus, where a party bought a quantity of rice per sample, according to the conditions of the East India Company's sale, to be put up at the next East India Company's sale, if required; and at the next sale it was put up by the defendant's order, and in his presence, at a limited price,—fresh samples, inferior in quality to the original samples, having been previously drawn and exhibited,—it was held that the purchaser could not afterwards repudiate the contract, although, no bidding having taken place to the limited extent, he had himself bought in the rice; *Parker v. Palmer*(a). There appears to be no good reason for saying that the acts of ownership which took place in the last two cases should "alter the nature of a contract originally false," any more than the acts of ownership in *Fielder v. Starkin* and the present case. *Okell v. Smith*(b) seems plainly to shew that length of time may affirm a contract originally false. [Lord DENMAN, C. J. Is it not for the jury to say whether, under all the circumstances of the case, the time is reasonable?] It appears to be a mixed question of law and fact.

Ludlow, Serjt. and *R. V. Richards*, contra, referred to *Gompertz v. Denton*(c), and to a case similar to the present which had been decided at Gloucester. This action was brought for compensation upon the breach of the warranty, not for the value of the horse.

LORD DENMAN, C. J.—We think that the case of *Fielder v. Starkin* is not over-ruled.

Per CURIAM—

Rule absolute(d).

(a) 4 Barn. & Ald. 387.

(b) 1 Stark. N. P. C. 107.

(c) 1 Crompt. & Mees. 207.

(d) And see *Campbell v. Fleming*, ante, iii. 834.

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BROOKES v. COCK.

No copyright vests in the engraver of any print under 17 Geo. 3, c. 57, unless the date of the first publication thereof be engraved thereon.

In Case for pirating such print, it is therefore a good plea in bar that the plaintiff has not the sole right of printing, &c. by reason that no date is engraved on the print.

CASE.—The declaration stated, that since the passing of 17th Geo. 3, c. 57, to wit, in May 1834, the plaintiff was and still is the proprietor of a certain *print* which had been designed and engraved in Great Britain, and was and still is lawfully entitled to the sole right and liberty of printing and reprinting and publishing and selling the said print. Yet the defendant, well knowing &c., did copy, publish, and sell divers, to wit, 10,000 copies of the said print, without the consent of the plaintiff and against his will, contrary to the form of the statutes, &c.

Plea: That the plaintiff was not nor is lawfully entitled to the sole right and liberty of printing &c., in manner and form &c., by reason that *no date is marked, printed, published, or engraved on the said print*, according to the force and effect of the statute, &c. **Verification.**

To this plea the plaintiff demurred, and assigned as cause of demurrer that the defendant had attempted to put in issue a matter wholly immaterial, and that does not nor can destroy or prejudice the plaintiff's right of action in respect of the grievances mentioned in the declaration.

Joinder in demurrer.

Platt, in support of the demurrer, stated that the question was, whether the insertion of the date of publication upon the print was a *condition precedent* to the vesting of the sole right of printing, publishing, and selling the print, given by the several acts (8 Geo. 2, c. 13, (a); 7 Geo. 3, c. 38, (b); 17 Geo. 3, c. 57 (c).) He admitted that in the case of

(a) *Vide post*, 653, 654, judgment of Littleale, J.

(b) The 7 Geo. 3, c. 38, extends the protection afforded by 8 G. 2, to the engravers of prints taken from any picture, drawing, model, or sculpture, as if such prints had been engraved from original designs of such engravers; and also

extends the time during which the copyright is to last, from 14 to 28 years.

(c) The 17 Geo. 3, c. 57, after reciting the two former statutes, and further reciting that they had not effectually answered the purpose for which they were intended, and that it was necessary for the

Newton v. Cowie (a) the Court of Common Pleas had decided, that in order to sustain an action for pirating prints, the proprietor's name and *the date of the publication* must appear on the original print: but he laboured to shew that the decision was not warranted by the words of the act of 8 Geo. 2, which, as far as related to the insertion of the date of publication, he contended to be *directory* and not *descriptive*. And further, he argued that the provision in 8 Geo. 2 was not incorporated in 17 Geo. 3, c. 57, upon which this action was brought.

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Thesiger, contra, was not called upon by the Court.

LORD DENMAN, C. J.—It is not necessary to say more than that the point has been already decided after great consideration. The decision of the Court of Common Pleas, I think, perfectly correct.

LITLEDALE, J.—The decision in *Newton v. Cowie* is quite correct. The words of the act of 8 Geo. 2, are not merely *directory*, but *descriptive of the mode of publication which is to give the publisher the benefit of the act*. That act says, that every person who shall invent and design and

encouragement of artists and for securing to them the property of and in their works, that such *further* provisions should be made as thereinafter contained;—enacts, that if any engraver or other person shall, within the time limited by the aforesaid acts, or either of them, engrave, &c., or in any manner copy in the whole or in part, by varying, adding to, or diminishing from, the main design; or shall print, reprint, or import for sale, or shall publish, sell, or otherwise dispose of, any copy or copies of any print which had been or shall be engraved, etched, drawn, or

designed in any part of Great Britain, without the express consent of the *proprietor* thereof first had and obtained in writing signed by him with his own hand, in the presence of and attested by two or more credible witnesses, then every such proprietor shall and may, by and in a penal action upon the case to be brought against the person so offending, recover such damages as a jury may upon the trial of such action, or on the execution of a writ of inquiry thereon, give or assess, together with double costs of suit.

(a) 4 Bingh. 234.

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engrave, &c., any print or prints, shall have the sole right and liberty of printing and re-printing the same for fourteen years, *to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints.* This act having given a remedy in case of piracy, by an action for certain *penalties* which are by that act imposed, the 17 Geo. 3, c. 57, gives the proprietor a further remedy by a general action *for damages*. The subject matter to which the two statutes apply is the same. The defendant is entitled to our judgment.

PATTESON, J. and COLERIDGE, J. concurred.

Judgment for the defendant.

BRAITHWAITE v. COLEMAN.

In an action on a bill of exchange, by indorsee against drawer, evidence was given of a conversation between the defendant and J. S., in which the defendant had said, in allusion to the action, that he

had several defences—that the plaintiff had not sent *the letter* to him *in time*. This having been left to the jury, after objection, as evidence of due notice of dishonour, and the jury having found a verdict for the plaintiff,—it was held, by *Littleale, J., Patteson, J., and Coleridge, J.*, (Lord Denman, C. J., dissentiente,) that the jury were not warranted in presuming that the plaintiff had given *due notice*.

A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded.

A plea of a set-off on a bill of exchange, payable to the order of the defendant and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded the bill had got back to the hands of the defendant.

conversation between the defendant and one *Dagley*, to whom the defendant had said that he had several grounds of defence, one of which was, that *Braithwaite* (the plaintiff) had not sent *the letter* to him *in time*,—by which *Dagley* understood that a letter, containing notice of the dishonour of the bill, had been sent by the plaintiff too late. It was objected, on the part of the defendant, that this was no evidence of notice, because, if it proved anything, it was that the notice had not been given in time. The learned chief baron was of opinion that it was evidence for the jury to consider whether notice had been given in due time. The defendant tendered in evidence, in support of his plea of set-off, a bill of exchange for 100*l.* This bill had been indorsed to, and at the time of the commencement of the action was in the hands of, a third party, who had commenced an action upon it against the plaintiff; but at the time of the trial, and before plea pleaded, the bill had got back into the hands of the defendant. This bill the lord chief baron refused to receive in evidence, saying that the plea would not be proved, since the allegation in the plea was, that before and *at the time of the action brought* the plaintiff was indebted to the defendant upon a bill of exchange; but his lordship gave the defendant leave to move to enter a nonsuit upon this point. The jury found a verdict for the plaintiff. In Easter term last, *Platt* applied for a rule nisi for a nonsuit or for a new trial, on the grounds that there was no proof of notice of dishonour, and that the evidence of the bill of exchange for 100*l.* was improperly rejected. With respect to the latter point he contended, that when the defendant again got possession of the bill of exchange, he was *remitted* to his former right of action. The Court^(a) granted him a rule nisi for a new trial on the *first* point, and refused the rule nisi for a nonsuit on the *second* point. Against the rule nisi for a new trial,

(a) Lord Denman, C. J., Littledale, J., and Parke, J.

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Channel (with whom was *Thesiger*) now shewed cause. The question was left to the jury to say whether they were satisfied that due notice had been given. The question therefore now is, whether there was *any* evidence to go to the jury. The defendant says he has several defences, the first of which is that the plaintiff did not send *the* letter to him *in time*. This shews that the plaintiff had sent *some* letter, and that the plaintiff had given *some* notice. The postmark on the letter would have shewn whether it was sent *in time* or not; but the defendant does not produce the letter, which is in his possession. As against him therefore it is but reasonable to infer that the letter was sent in time.

Platt and *Wallinger*, in support of the rule. No evidence was given that the letter spoken of was sent *by the post*. All the evidence was an admission by the defendant that some letter was sent, which had not been sent in due time. The whole of an admission must be taken together; *Randle v. Blackburn* (a). Supposing therefore that what the defendant said amounted to a statement that he had received notice, it at the same time expressly negatived the receipt of *due* notice. There was not therefore any evidence whence the jury could infer that due notice had been given. Suppose the defendant had said to the plaintiff—"You sent your notice on the 28th of November;"—could it be inferred from this that the notice had been sent on the 26th? *Lawson v. Sherwood* (b) goes further than this case. That was an action by the indorsee against the indorser:—A witness stated that two or three days after the dishonour of the bill, notice was given by letter to the defendant; notice in two days being in time, but notice on the third too late. Lord *Ellenborough* held that it could not be left as a question to the jury whether notice was given in time, although the defendant had had notice to produce the letter. [Lord

(a) 5 Taunt. 245.

(b) 1 Stark. N. P. C. 314.

Denman, C. J. In that case the question arose upon the statement of the *plaintiff's witnesses*; here, it arises from the assertion of the *defendant*.]

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LORD DENMAN, C. J.—The statement of the defendant ought certainly to be taken altogether. But the jury were, in my opinion, warranted, if they disbelieved that part of his statement (*a*) which related to *the time* of sending the notice, in rejecting it as untrue.

LITLEDALE, J.—I confess that it seems to me that the jury were *not* warranted in finding that the notice had been sent in due time.

PATTESON, J.—I think this evidence is not proof of due notice. It does not appear that the defendant had the means of producing the letter. Suppose it was dated in time, and sent too late by a private hand:—if the defendant in that case had produced the letter, dated at the proper time, he would have destroyed his own defence.

COLERIDGE, J.—The whole statement must go to the jury. But then, are they justified in presuming from that statement that the notice was sent in due time? It seems to me that this evidence did *not* warrant the jury in finding that the notice was sent in due time.

Rule absolute for a new trial (*b*).

(*a*) And see *Berman v. Woodbridge*, 2 Dougl. 788.

(*b*) A *stet* process was subsequently entered by consent.



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THACKER v. WILSON.

An administrator, who as such receives the improved rents of a house in the metropolis, from the tenant in possession,—is liable, under s. 41 of the Building Act (14 Geo. 3, c. 78), to be sued for the moiety, or other proportional part, of the expense of building of a party-wall, erected by the owner of the adjoining house in pursuance of the act.

Semble, that these expenses are in the nature of a lien upon the improved rent; and that therefore, to the extent of such moiety, or other proportional part, the rent is not *assets* in the hands of the administrator.

ASSUMPSIT for 57*l.* 3*s.* 6*d.*, claimed as the moiety of the expenses of building a party-wall, pursuant to the directions of the Building Act (14 Geo. 3, c. 78,) between a house of the plaintiff, in London, and an adjoining house, of which the defendant was alleged to be the “owner, and entitled to the improved rents.” Pleas: first, non-assumpsit; secondly, that the defendant, for a long time before and at the time of making the supposed promise, had been and was administrator of the goods of one *Newberry*, an intestate; that before and at the time of pulling down and rebuilding the party-wall, and until the making of the supposed promise, *the defendant was such owner of and entitled to the improved rent of the said messuage mentioned in the declaration, as administrator as aforesaid*, and in right of *Newberry*, deceased, under an indenture, dated 25th March, 1818, whereby *T. C.* demised the said messuage to *Newberry* for a term yet unexpired, and an underlease of 21st June, 1827, whereby *Newberry* demised the same to one *Ehsworth* for a term yet unexpired, at certain rents. That in E. T. 11 Geo. 4, one *Wilson*, after the death of *Newberry* and before the pulling down of the wall, brought Debt against the defendant, as administrator, for 2700*l.* due to *Wilson* from *Newberry*, and recovered against the defendant, as such administrator, his said debt of 2700*l.*, and also 4*l.* 5*s.* for damages and costs, to be levied of the goods &c. of *Newberry*, if sufficient, and if not, then the costs to be levied of the proper goods &c. of the defendant; which judgment so had and obtained was for a just debt owing to *Wilson* from *Newberry*, and still remains in full force. The plea then states that the sum of 2700*l.* was still due to *Wilson*, and that the defendant had fully administered except to the value of 10*l.*, and that he has not nor had at the time of the said pulling down, or at the commencement of the suit or since, any goods &c. of *Newberry* in his hands to

be administered, except as aforesaid, which are not sufficient to satisfy the debt due and owing on the judgment, and which are subject and liable to satisfy the same. Verification, and prayer of judgment. Replication, to the second plea, that the said improved rent was and is 210*l.* a year, payable by virtue of the underlease mentioned in the plea, and that the same was of such value above all charges, that the defendant could and might, and ought to have paid and satisfied the plaintiff the sum of money mentioned in the declaration. Verification, &c.

General demurrer, and joinder.


Cowling, in support of the demurrer. Sect. 41 of the Building Act (a) makes *the owner who shall be entitled to the improved rent* of the adjoining house liable to pay a

(a) 14 Geo. 3, c. 78, which enacts, in sect. 41, that the person at whose expense any party-wall shall be built agreeably to the directions of that act, *shall be reimbursed by the owner who shall be entitled to the improved rent of the adjoining building* or ground, and who shall at any time make use of such party-wall,—a part of the expense of building the same in the proportion after-mentioned, that is to say—If the adjoining building then erected or thereafter to be erected be of the same rate or class of buildings, or superior to the building belonging to the person at whose expense the party-wall was built, then the *owner or occupier* of such adjoining building or ground shall pay one moiety of the expense of building so much of the said party-wall as such owner or occupier shall make use of; and if the adjoining building be of an inferior class, then the *owner or occupier* of such adjoining

building or ground shall pay a moiety of the expense of building a party-wall of the thickness required for his building, and of the height and breadth of so much thereof as such owner or occupier shall make use of. *And until such moiety or other proportional part of the expense of building such party-wall be so paid, the sole property of such party-wall, and of the whole ground whereon it stands, shall be vested entirely in the person at whose expense the same shall be built.*—And that within ten days after such party-wall shall be so built, or as soon after as conveniently may be, such first builder shall leave at such adjoining house or building a true account in writing of the number of rods in such party-wall for which the owner of such adjoining building or ground shall be liable to pay, and also an account of the expenses; whereupon *it shall be lawful for the tenant or occupier of such adjoining house or*

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part of the expense of building a party-wall under that act. The defendant being an administrator only, is not an *owner* of the improved rent, within the act, so as to be liable; or, if he is liable, he is so only as administrator, and therefore the want of assets is a defence.

I. An administrator cannot be an "owner" within the act; for "owner" must mean "owner in his own right." The acts relating to *costs* have always been held not to apply to executors and administrators, although the words in those statutes are quite as large as those which are used here. The plaintiff has a good *lien* on the wall; for one of the remedies is, that the first builder of the party-wall shall have the property in the whole wall and the ground on which it stands, vested in him until the owner of the adjoining property pays his proportion of the expenses. He has also a remedy against the *tenant*, whom he may compel to pay such expenses, and who may deduct the same out of his rent.

II. If liable, he is so *as administrator* only; and therefore if there is another creditor of a higher degree than the first builder of the party-wall, the debt of such other creditor must first be discharged by the defendant. It appears that there is in this case a *judgment debt*, to discharge which the defendant has no assets; whereas *this* is only a simple contract debt, as appears sufficiently by the form of the action, which is in *assumpsit*. It may perhaps be contended that the defendant, being in the receipt of the improved rent, is liable *as assignee*. But there has never been any *possession* of the house by the defendant; and in such case only can he be liable as assignee. The course which the plaintiff ought to have pursued is that of requiring

building to pay one moiety or such proportional part as aforesaid to such first builder,—and to deduct the same out of the rent which shall become due from him to such owner under whom he holds the same, until he shall be reim-

bursed. And in case the same shall not be paid within twenty-one days after demand, then it may be recovered from such owner by action of debt or on the case.

the *tenant* to pay the proportional part of the expenses of building this party-wall; and then the tenant might have deducted the amount from his rent. If the defendant receives the whole rent from the tenant, and pays the plaintiff's demand, the amount must come out of his own pocket. As *administrator*, he cannot pay it; for as soon as he receives the rent from the tenant, it becomes *assets*, out of which he is bound first to pay the creditors of the highest degree. The late case of *Tremeere v. Morison* (a) may be relied on *contrà*. There it was held, that an administrator who has *occupied* premises demised to the intestate, cannot, in Covenant for rent and taxes and for non-repair, plead that the premises yield no profit. That case is distinguishable from the present on two grounds; first, there has been here no *occupation* by the administrator; and secondly, this is not a case of landlord and tenant, as that was. The administrator can, in a case like the present, be liable only as such, and as such he is liable only where there are *assets*.

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Holt, *contrà*. The *plea* is bad, in that it does not state that the improved rent of the premises, after payment of the rent due to the superior landlord, is of no value, or of insufficient value, or of any value. The defendant, as administrator, is liable to the extent of the value of the improved rent, after payment of the rent due to the superior landlord. He should therefore have stated in his plea what the value of that rent was, or that it was of no value.

The defendant, receiving the rent from the tenant in possession, is *owner of the improved rent* within the meaning of sect. 42 of the Building Act. He admits that he is owner of the improved rent, but says that he is so only as *administrator*. There is no ground for supposing that executors and administrators are excepted out of this enactment. There is no positive, nor is there any *implied* exception.

(a) 1 Bingham N. S. 89.

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The object of the legislature was to cast the liability to pay the moiety of the expenses of building a party-wall in a manner upon the improved rent itself. The owner of the improved rent is liable, and the tenant is authorized to pay the amount due, and to deduct it out of his rent. If the defendant could shew that the improved rent was of no value, that might be a defence; but to the extent of the value of the improved rent he is clearly liable as assignee. *Rubery v. Stevens* (a), *Tremeere v. Morison* (b), are strong authorities for the plaintiff. [*Patteson, J.* Those are cases of landlord and tenant.] In the latter case the action was not only for rent, but also for repairs, which are closely analogous to the claim in the present case.

Cowling in reply. The act does not say that the receiver of the improved rent shall be liable, but the "owner," which means "owner in his own right." This defendant receives the rent merely as a channel to distribute to other persons. The plaintiff should have been satisfied with his lien on the wall, or have called upon the tenant to pay his demand; for then no hardship would have been inflicted on the defendant. The moment that the defendant receives the rent it becomes his duty to distribute it to the intestate's creditors. [*Littleddale, J.* Is not this in the nature of a lien upon the lease, so that the rent would not be necessarily liable to be distributed?] The act does not give a lien upon the improved rent. [*Littleddale, J.* It is very reasonable that there should be a lien. *Patteson, J.* I see that the act does not make the tenant liable. It only says that he may pay and deduct from his rent. If he does not pay, then the owner of the improved rent is liable to an action. If the tenant does pay, he may get the amount from his landlord by deducting it from his rent; so that if there be several intermediate landlords between the tenant in possession and the owner of the improved rent,

(a) *Ante*, vol. i. 182, and 4 (b) *Suprà*, 661.
 Barn. & Adol. 241.

each in his turn may deduct it until at last the owner of the improved rent is compelled to pay it. I do not see what difference there can be between the defendant's paying these expenses at once as owner of the improved rent, and his paying them indirectly by means of a deduction from the rent.]

LORD DENMAN, C. J.—I am of opinion that the defendant is, within the meaning of the act of parliament, an "owner entitled to the improved rent," and that therefore he is liable to be sued for the moiety of the expenses of making this party-wall. I do not think that he will be liable to the judgment creditor for the amount of the rent, for the rent which he is bound to pay him is the rent *after the deductions to which that rent is liable*.

LITLEDALE, J.—The plea is defective. The defendant does not distinctly deny that he is the owner of the improved rents, nor does he state any facts which went to shew that he is not liable as owner; but he stands only upon his being owner *as administrator*. That, I think, makes no difference at all. But then the defendant says that since the death of *Newberry*, judgment has been recovered against him, and that the *assets* are liable to the payment of the judgment debt first. Of that there is no doubt; but I much question whether a portion of the rent equal to the amount of the plaintiff's claim *would be assets*. The expenses of making the party-wall are a necessary charge upon the rent, and although the act gives no express lien upon the rent, it is very reasonable that these expenses should be considered as such.

PATTESON, J.—It is quite clear that if *Newberry* had been alive he would have been the owner of the improved rent (a), and I think it is equally clear that his administra-

(a) And see *Southall v. Ledbetter*, 3 T. R. 458; *Barrett v. Duke of Bedford*, 8 T. R. 602; *Williams v. Pocklington*, 2 Barn. & Adol. 878.

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such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." It was objected that the plaintiff's right to recover was barred by the 17th section of the act. To this objection there are two answers:—

First point:
Adverse possession.

First, the possession of the defendant, as he did not give evidence to the contrary, must be presumed to be rightful (a); and if rightful, then as no fine had been levied, it must be in accordance with, and not adverse to, the title of the plaintiff. If the defendant's possession was not adverse, then the plaintiff was entitled to recover, his action being brought within five years after the passing of the act, under the provision of the 15th section, which enacts, that where the possession is not adverse at the time of passing of the act, the right shall not be barred until the end of five years afterwards. Here it is clear the possession was not adverse. It is true that mere possession for twenty years is strong presumptive evidence of a seisin in fee; but that is only where no other title appears. Here evidence was given of the seisin of *Whitworth* in 1772, and of his will, and the possession of Mr. and Mrs. *Corby* under that will. The defendant's mere possession, therefore, could not avail him. It is to be presumed that the defendant's possession was rightful; *Hall v. Doe* (b), *Doe v. Hull* (c), *Doe v. Pike* (d), *Doe v. Harborough* (e); and being rightful, was not adverse to the title of the lessor of the plaintiff.

Second point:
New title.

Secondly. The lessor of the plaintiff acquired a new right on the death of his father in 1832, and could, by the 5th section of the act, maintain the action. That section provides "that a right to bring action to recover any land shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same

(a) *Vide Reading v. Rawsterne*,
2 Lord Raym. 829.
(b) 5 Barn. & Alders. 687.

(c) 2 Dowl. & Ry. 38.
(d) *Ante*, i. 385.
(e) *Ante*, i. 422.

shall have become an estate or interest in possession, by the determination of any estate in respect of which such lands shall be held, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time, previously to the creation of the estate which shall have determined, have been in possession or receipt of the profit of such land." The husband and wife, in this case, were in possession, and had a son, the lessor of the plaintiff. The husband, upon the death of the wife, therefore, became tenant by the curtesy, and his estate did not expire until his death in 1832. The lessor of the plaintiff until that period was only entitled to a reversion, and on his father's death it vested in possession. By the 5th section, therefore, the action is maintainable.

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Cur. adv. vult.

Lord DENMAN, C. J., in the course of the term, delivered the judgment of the Court as follows:—

The fact being clear, that within the terms of the 3 & 4 Will. 4, c. 27, s. 3, the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents above forty years before the action brought, the action is clearly barred by section 17. Some argument was raised on the question whether the possession was *adverse* or not; but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date.

If the person actually in possession could be shewn to have held *under* the party through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter, but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance, without appearing to have received any rent, or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of

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ownership; and as the title of the plaintiff's ancestor rested on no documents, except the will of the former husband, but was merely evidenced by possession at an early period, that ancestor's entire desertion of the premises for so long a time goes far to shew a consciousness that the anterior occupation was without title.

Second point.

It is true that if Mrs. Corby was the owner, her husband was tenant by the curtesy, and their son's right of possession did not accrue till after his father's death; but this furnishes no answer to the positive enactment of limitation in the 17th clause.

It is true, also, that in the cases cited at the bar, this Court shewed a strong indisposition to *presume* a possession *adverse* which *might* be lawful consistently with the facts found. Of these cases no more need be said on the present occasion than that they were not brought within the late statute.

Rule refused.

 ROPER v. HOLLAND.

A., seised of lands, in trust to pay the net rents to B., receives 27l. rent, and pays 10l. into a bank, with directions for it to be paid to B., on his giving a receipt for 27l.:—Held, that this is evidence of an acknowledgment of a debt to B., upon which B. may maintain an action upon an account stated:—Held, also, that A. is precluded from shewing that at the time of the acknowledgment no balance of rent was in fact due.

ASSUMPSIT. The declaration contained a count on an account stated. Plea: non assumpsit. At the trial before Patteson, J., at the Worcester Spring assizes, 1834, the plaintiff's case appeared to be this:—

A house and farm had been conveyed to the defendant, in trust that he, out of the rents, would pay Mrs. Roper, wife of the plaintiff, 100l. a year, and after paying for necessary repairs to the premises, would pay over the residue, if any, to the plaintiff. The defendant entered into possession and let the premises, and in one half year received 77l. for rent. Out of this he paid Mrs. Roper 50l. and having paid for some repairs, he paid into a bank 10l., with directions to a clerk there to pay it to the plaintiff,

an account stated:—Held, also, that A. is precluded from shewing that at the time of the acknowledgment no balance of rent was in fact due.

upon his giving a receipt for 27*l*. The defendant's counsel contended that the defendant, being a trustee, could not be sued unless upon an account stated *with the plaintiff*, and that there was no evidence whatever of an account stated. The learned judge, however, refused to nonsuit. The defendant then tendered evidence to shew that in fact he had made payments for repairs exceeding the whole of the 27*l*. This evidence the learned judge rejected. A verdict having been found for the plaintiff for 10*l*. damages, on the count upon an account stated, *R. V. Richards*, in the following term, obtained a rule to shew cause why a nonsuit should not be entered.

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Ludlow, Serjt., and *Godson*, now shewed cause. It is difficult to conceive on what ground this rule was obtained. There was clearly an acknowledgment of a balance of 10*l*. due from the defendant to the plaintiff. That sum had been paid into the bank, with express directions to pay it to the plaintiff upon his giving a receipt for 27*l*. This condition, with which the plaintiff was not bound to comply, does not make the *acknowledgment* of less force.

R. V. Richards, *contra*. The questions are, whether upon the evidence coupled with the deed the plaintiff had any right to recover, and whether the learned judge was right in refusing to receive the evidence as to the amount of repairs done. The plaintiff cannot claim under this deed by action of law, but only by bill in equity, unless there has been an actual balancing of the account between himself and the trustee, so as to afford evidence of an account stated. [Lord *Denman*, C. J. There is no doubt about the law upon that subject(a).] That which was said by the defendant to the banker's clerk was not sufficient evidence of a balance struck. He does not say that he has 10*l*. which he is *bound* to pay, but, in effect, he says, "I have 10*l*. which I am *ready* to pay if you will give me a receipt

(a) *Vide Foster v. Allanson*, 2 482; *Allen v. Impett*, 2 B. T. R. 479; *Moravia v. Levy*, *ibid.* Moore, 240.

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for £7l.ⁿ Upon those conditions he was willing to pay the 10l. to the plaintiff. It does not follow that because he communicated that fact, and accompanied it with an offer of the 10l., he is to be liable to be sued for it. If, however, it is thought that this evidence, taken by itself, was evidence of a balance stated, still the defendant ought to have been allowed to shew, in answer to the plaintiff's demand, that by reason of payments for repairs to an amount exceeding the £7l., there was, in fact, no balance due from the defendant to the plaintiff; and therefore the evidence was improperly rejected.

LORD DENMAN, C. J.—It seems to me that the defendant has *stated* an account, in which he has admitted a balance of 10l. to be due to the plaintiff. The *actual state* of the account was immaterial.

LITLEDALE, J.—The defendant being a trustee, *admits* that he has 10l. to pay his cestui que trust, and is, therefore, liable at law.

COLERIDGE, J.—If a trustee sends an account, and admits a balance, he is liable to be sued at law. It appears to me that this defendant has admitted a balance. He stated in effect that he had paid 17l. for repairs, and would pay over the remainder to the plaintiff.

PATTESON, J.—That was the effect of the evidence; and I do not see how it could be altered by the evidence tendered on the part of the defendant, but by falsifying the defendant's own statement to the clerk. When the defendant said that he would pay 10l. he did not qualify his promise in the manner suggested.

Rule discharged (a).

(a) That a count upon an account stated may be supported by evidence of the acknowledgment of a single item, see *Highmore v. Primrose*, 5 Maule & Selw. 65, and 2 Chit. R. 338.

A party who has made an admission, upon which he has obtained some advantage to himself, or by which he has induced others to act, or to forbear to act, is estopped from shewing that the admission was unfounded. In other cases an admission, or an account stated, appears not to have been considered as *conclusive* upon the party, but as leaving him at liberty both to surcharge and to falsify. *Trueman v. Hurst*, 1 T. R. 40, 42; *Walker v. Consett*, *Forrest*, 157; *Drew v. Power*, 1 Sch.

& Lef. 182, 192; *Chambers v. Goldwyn*, 6 Ves. 254, 265; *Fountain v. Gnales*, *Comberb.* 59, 60; *Alner v. George*, 1 Campb. 392; *Benson v. Bennett*, *ibid.* 394, n.; *Burton v. Eastman*, 1 Esp. N. P. C. 172; unless the acknowledgment were under seal; *Rowntree v. Jacob*, 2 Taunt. 141. And see *Cox v. Prentice*, 3 Maule & Selw. 344; *Gomery v. Bond*, *ibid.* 378; *Milner v. Duncan*, 9 Dowl. & Ry. 731, and 6 Barn. & Cressw. 671; *Bishop v. Chamber*, *Mood. & Malk.* 116, and 3 Carr. & P. 55.

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The KING v. CLARKE and another.

RICHARD CLARKE and *Thomas Austin* were indicted for an assault upon *Francis Grinder*, a constable of the parish of Southbersted, in Sussex. The first count charged the defendants with assaulting *Grinder* whilst in the execution of his duty as a peace officer. The second was for a common assault on *Grinder*. The indictment, which was found at the Sussex January sessions, 1834, was, at the instance of the defendants, removed into this Court by certiorari, and was tried before *Gaselee*, J. at the Sussex Spring

A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such

arrears, if necessary,—unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted.

Where, however, *A.* a collector, unwarrantably, but without any objection being made, introduces *B.*, a constable, into the house of *D.*, a person from whom he demands taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduces *C.*, another constable, upon whom *D.* commits an assault; it is no answer to an indictment against *D.* for the assault on *C.* in the execution of his duty, that the collector had wrongfully introduced *B.*

A collector demands taxes due, from *D.*, the owner of a house, and intimates that, in case of non-payment, he shall distrain; upon which *D.* threatens *A.* with personal violence, but ultimately promises to send the amount on a certain day. This promise not being performed, *A.* goes again to *D.*'s house, and demands the taxes of *D.* *D.* leaves the room in which *A.* is, and fastens the outer-door:—Held, that *A.* was justified in unfastening the door and introducing constables. And held, that, upon *D.*'s returning into the room, after the introduction of the constables, accompanied with a number of men, and commanding *C.* one of the constables, whom he knew to be such, to leave the house, it was the duty of *C.* and the other constables to remain.

A collector of taxes may distrain without having his warrant with him, *semble*.

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assizes, in 1835. It then appeared, that one *Tipper*, who was the collector of the land and assessed taxes for the parish of Southbersted, applied, on 28th October, 1834, to the defendant *Clarke*, for payment of 8*l.* 2*s.* 2*d.* for arrears of land tax due from him. *Tipper* was accompanied by *Collins*, a constable. When they had entered *Clarke's* house, which was a public-house, *Tipper* said he came for the land tax. Upon this *Clarke* said "I suppose if I do not pay you will distrain;" to which *Tipper* assented. *Tipper* then demanded 8*l.* 2*s.* 2*d.*, as arrears of land tax, and likewise remarked, that a sum was due for assessed taxes. *Clarke* then said, that if *Tipper* touched any thing, he would split his skull. *Tipper* replied, that he was not much afraid of that. *Clarke*, who had a whip in his hand, then said, that if *Tipper* and *Collins* did not go away, he would "bundle" them out, and desired them to call on the following Saturday; but ultimately he said he would send his son on the following Saturday with the money. It was not, however, sent on that day, and *Tipper*, who in the meantime had had an accident, did not call upon *Clarke* again until the 29th of November. On this occasion he took *Collins* with him, and likewise desired *Grinder* and *Holder*, two other constables, to accompany him, lest any violence should be attempted. *Tipper* and *Collins* entered the house, and *Grinder* and *Holder* remained at a short distance. Upon *Clarke's* appearing, *Tipper* said he came for the land tax. *Clarke* went out of the parlour into the passage and fastened the outer door with a chain, and then went into the interior of the house. *Tipper* heard the noise made by *Clarke* in fastening the door, and desired *Collins* to open it, and let in *Grinder* and *Holder*, which was done accordingly. *Clarke* shortly returned with eight or ten men, amongst whom was *Austin*. *Clarke* asked *Tipper* what "that thief-catcher" *Grinder* wanted there? *Tipper* answered, that he had come to aid and assist him. *Clarke* then said, he would not pay whilst *Grinder* remained in the house, and ordered *Austin* to turn him out.

Austin seized *Grinder* by the collar, and dragged him to the door. A scuffle took place, and ultimately *Clarke* paid the money, and the parties separated. The learned judge told the jury that the question, whether the defendant assaulted *Grinder* in the execution of his duty, must depend upon the construction of 38 Geo. 3, c. 5; for, if *Grinder* was not lawfully in *Clarke's* house, the defendants were entitled to an acquittal. The learned judge said, that in the event of there being a verdict of guilty, he gave the defendants leave to move to set that verdict aside, and enter a verdict of not guilty; and his lordship desired the jury to consider whether the constables, *Collins*, *Grinder*, and *Holder*, were taken by *Tipper*, the collector, under a reasonable anticipation of violence, or merely to annoy *Clarke*. The jury found the defendants guilty, and that the constables were taken under a reasonable anticipation of violence. In the early part of this term, *Andrews*, Serjt. obtained a rule nisi to set aside the verdict of guilty, and enter a verdict of not guilty; against this rule,

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Platt and *G. F. Jones* now shewed cause. The rule was obtained on the ground that the constable was not acting in the execution of his duty; and that consequently the assault was justifiable. The constable was performing the duty which was imposed on him, not only by the statute 38 Geo. 3, c. 5, but also by the common law.

Section 17 of 38 Geo. 3, c. 5, (a) enacts, that if any person

(a) "And whereas doubts have arisen, touching the authority of collectors to distrain for non-payment of the land-tax under the warrants usually granted by commissioners at the time of their appointments, be it further enacted and declared, that if any person shall refuse or neglect to pay any sum or sums of money, whereat he or she shall be rated or assessed by this act; upon demand by the said

collector or collectors of that place, according to the precepts or estreats to him or them delivered by the said commissioners: that then, and in all and every such case and cases, it shall be lawful for the said collectors, or any of them; and they are hereby authorized and required, to levy the sum assessed, by distress and sale of the goods and chattels of such person so neglecting or refusing to pay, or distrain

First point.
 Constable justified in entering, under
 38 Geo. 3, c. 5.

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shall *refuse or neglect* to pay any sum of money due for the land tax, the collectors may levy the sum assessed by distress and sale of the goods of the person refusing to pay. The section then directs that the goods shall be appraised and sold, and provides that it shall be lawful for the collector, by warrant under the hands of two of the commissioners, to break open any chest, box, or other thing, where any goods are, "calling to their assistance the constables, tithing-men, or headboroughs within the counties, ridings, cities, towns, or places, where any *refusal or neglect* shall be made." Then come these words, which evidently override the whole section, "which said officers are hereby required to be aiding and assisting on the premises, as they will answer the contrary at their peril." It is contended by the defendants, that these words refer only to the power previously given, of breaking open chests; but it is evident, from the circumstance of these words being placed at the end of the section, that this was not the intention of the legislature, but that its object was, that in *all* cases where, in the words of the act, "any refusal or neglect shall be made," the assistance of the constables may be required for

upon the messuages, lands, tenements, and premises, so charged with any such sum or sums of money, without any further authority from the commissioners for that purpose: and the goods and chattels then and there found, and the distress so taken, to keep by the space of four days, at the cost and charge of the owners: and if the said owners do not pay the sum or sums of money so rated or assessed within the said space of four days, then the said distress shall be appraised by two or more of the inhabitants where the same shall be taken, or other sufficient persons, and shall be sold by the said collectors for payment of the said money, and the overplus coming by such sale (if any be) over and above the tax

and charge of taking and keeping the said distress, shall be immediately returned to the owners thereof; and moreover, that it shall be lawful to break open, in the day-time, any house, and, upon warrant under the hands and seals of any two or more of the said commissioners, any chest, trunk, box, or other thing, where any such goods are, *calling to their assistance the constables, tithing-men, or headboroughs* within the counties, &c. where any refusal or neglect shall be made; *which said officers are hereby required to be aiding and assisting in the premises, as they will answer the contrary at their peril.*" And see *Ward v. Const.*, 10 Barn. & Cresw. 635; and 5 Mann. & Ry.

the purpose of distraining, if necessary. Section 40 of the act shews that the legislature contemplated the interference of the constables, since that section enacts, that where land or a house is unoccupied and no distress can be found, the collector or constables may enter, at a subsequent period, and distrain.

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II. The constable was justified by the common law in accompanying the collector, and entering Clarke's house. It is found by the jury that the collector reasonably anticipated that there would be a breach of the peace. That is good ground at the common law, for the interference of a constable. This resembles the case of the swearing in of special constables by magistrates, when they apprehend a tumult. The moment special constables are sworn in, they may interpose to prevent a breach of the peace, and whilst stationed in any place for that purpose, they are deemed in law to be in execution of their duty, though no breach of the peace should eventually take place.

Second point.
 Entry of constable justified at common law.

III. There is a count for a common assault, and the verdict upon that count is clearly sustainable.

Third point.
 Common assault.

Andrews, Serjt. and Long, in support of the rule.

I. The collector and constable were not acting in pursuance of the statute 38 Geo. 3, c. 5, since the collector did not produce his warrant to distrain, nor was there any refusal on the part of Clarke to pay the land-tax. The first act which Tipper ought to have done was to produce his warrant. [*Patteson, J.* The collector has a general warrant to distrain, and every one knows that the collector has such a warrant.] Where a collector attempts to enforce payment by means of a distress, he ought to have his authority for so doing with him. There was no refusal on the part of Clarke. Tipper was the collector of the assessed taxes as well as collector of the land-tax; and he mentioned to Clarke that there was a sum due for the assessed taxes. He did not specifically demand the sum due for the land-tax, and therefore there could not be a refusal.

First point.

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A constable is not authorized, *by virtue of his office*, to levy a distress, nor does the law authorize a party to call in a constable for that purpose. The statute merely authorizes the collector to call the constables to his aid when chests or boxes are to be *broken open*; and for this purpose the collector must have a specific warrant. At all events, the construction to be put upon the statute in this respect is doubtful. If a statute, which gives an authority to a party not possessed by him at common law, is ambiguous, the authority will not be extended by construction.

II. It may be conceded, that, in *some* cases, the collector would be justified in taking a constable with him; not-so in this case, as no distress was made. It is said that the collector had reason to apprehend *violence*, from what took place upon the occasion of his first visit. A constable is not warranted in interfering upon a mere *suspicion* that the peace may be broken; nor was there any ground for apprehension from what occurred upon *Tipper's* first visit, since *Tipper* said he was not afraid, and *Clarke* then promised to pay the sum due for the land-tax. If *Tipper* had apprehended violence, and wished to be protected, that object would have been gained by placing the constables *near* the house, without introducing them *into* the house.

Lord DENMAN, C. J.—The first question in this case is, whether this was an assault committed by the two defendants, *Clarke* and *Austin*, on *Grinder*, in the execution of his duty. *Grinder* was a constable, and was brought to the premises of *Clarke* by a tax-gatherer named *Tipper*. *Tipper*, having before repeatedly called for the taxes due from *Clarke*, and payment not having made, had gone to *Clarke's* house on the 28th October, when he was asked whether he did not mean to distrain, and he replied he might find it his duty to do so. He was then told, that if he touched any thing, a violent injury would be inflicted on him. *Clarke* promised to send the taxes to him within a short time. *Tipper*, on the 29th November, went again to

Clarke's house, accompanied, as before, by *Collins*. On neither of these occasions does any objection appear to have been taken to his being so accompanied. He also took with him two other constables, named *Grinder* and *Holder*, but did not introduce them into the house at first. When *Tipper* had entered *Clarke's* house, and had said that he had come for the taxes, *Clarke* fastened the door on him, and kept him and *Collins* within the house. Now what right *Clarke* had to do that, it is impossible to discover. He had no right to imprison *Tipper* and *Collins* there; and I think that *Tipper* had very just ground of apprehension from this act, and from the language that had been used on the occasion of his first visit, that violence was still intended. Then *Collins* opens the door and introduces *Grinder* and *Holder*. In the meantime, several persons at the public house (very possibly drinking there, and not unlikely to join in acts of violence) were brought by *Clarke* to the spot. The two constables were brought in by *Tipper* (the jury have so found) with a real apprehension on his part that mischief might arise, and not for any purpose of annoying the party from whom the taxes were due. *Clarke* then says that he will pay no taxes while those *thief-catchers* remain, and he orders *Austin* to turn *Grinder* out of the house, and says that he will stand by him and see that he does not suffer by it. The question is, whether *Grinder* was not at that time in the execution of his duty as a constable. I must own that I cannot entertain any doubt whatever but that he was. I think that the collector, having met with the treatment which he before experienced, was perfectly warranted in calling in the constable, and that the constable would have deserted his duty if he had quitted the place voluntarily. He would certainly have left the collector exposed to very considerable danger, and he had been brought there to prevent the mischief and assault that was extremely likely, under the circumstances, to take place.

The statute does not appear to me to be applicable to

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this case. On the ground of the general duty of the constable, and the general right of every person, in the execution of a public duty, to have the protection of the law, I think that *Tipper* was perfectly justified in taking *Grinder* there by way of precaution; that *Grinder* did not come into the house until it was proper that he should do so; and that he would not have been justified in voluntarily leaving the house at the time when the defendant thought proper with strong hand to eject him.

LITLEDALE, J.—I am of opinion that this verdict must be sustained. (His lordship here recapitulated the facts of the case, and proceeded):—I think that *Tipper* was fully justified in taking the constables with him and letting them into the house. There was a reasonable apprehension of violence on his part; and I am quite satisfied that the constables were lawfully in the house for the purpose of aiding and assisting in the prevention of a breach of the peace, and that the defendants were both, in point of law, guilty of an assault.

PATTERSON, J.—I am also of opinion that the verdict must be sustained upon the first count of this indictment; but I do not found my opinion on the provisions of the *statute*, because I think it quite clear that this act, so far as relates to calling in the aid and assistance of a constable, relates only to a case in which it is necessary to break open chests or boxes, and where the collector has a special warrant. I think the presence of the constable was justified by the conduct of *Clarke* himself. When applied to in October he refused to pay the money; and upon being given to understand that a distress must be made, he uses very violent language, and threatens that if a single thing is taken away he will break the collector's skull. It is true that the collector answers that he is not afraid of that,—because he does not suppose the man will carry his threat into effect.

Ultimately, on this occasion he agrees to send the money on a certain day. He does not, however, send the money on that day; and some time after, the collector applies again for the money. It does not appear that he then intended to distrain in the first instance; for he demanded the taxes again—meaning, of course, to follow up this demand by a distress, *if necessary*. He took with him *Collins*, a constable, which I think he had no right to do either in November or in October. A tax-collector has no right to introduce a stranger into the house of a person from whom taxes are due, unless there be some *resistance*. He has no right to take any person he thinks fit along with him into the house. But no objection was on either occasion made to *Collins's* being in his house; and no other person was taken by the collector into the house when he first entered it on the 29th November. It is true that two other constables accompany the collector, but he leaves them outside the door to be ready there in case their assistance should be necessary, should any violence be attempted, which he had reason to apprehend. When *Clarke* is called on for the money, he leaves the room apparently for the purpose of getting it. I will take it to have been so. But when he is out of the room, *Collins* and *Tipper* hear a noise as if *Clarke* was fastening the outer door, and in his absence *Collins* goes to see whether that is the fact. He finds that the outer door is fastened. That circumstance justified *Tipper* in supposing that violence was intended, for if *Clarke* intended to pay the money peaceably, he had no occasion to fasten the outer door. In order to protect *Tipper* and himself from that violence, *Collins* opened the door and let in the two other constables whom *Tipper* had brought for the purpose of protecting him from any violence. So far *Tipper's* conduct appears to have been quite correct. *Clarke* returns, not alone, but accompanied by ten or twelve men, and finding *Grinder* and the other constable in the room, he says, having those ten men at his back, “turn that man

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out, or I will not pay the money." If the constable had gone out and left the collector unprotected, *Clarke* would probably, when the door was shut, have overpowered the collector and would have paid nothing. The constable, however, as it seems to me, very properly refuses to leave the room, but stays to protect *Tipper*. What does *Clarke* do? Instead of paying the money and bringing an action against the constable for coming into the house, if he thought he could succeed, he orders him to be turned out. It appears to me that the constable was in the performance of his duty, and that an assault was committed by the defendants, which comes within the first count.

COLERIDGE, J.—I am quite of the same opinion. The short question is, whether *Grinder*, at the time when the assault took place, was *lawfully* in *Clarke's* house, and *lawfully persisting to stay* in that house. If he was, and if the lawfulness of his stay there arose out of any part of his duty as constable, then undoubtedly this verdict may be sustained on the first count of the indictment. I am of opinion that he was *clearly justified* both in being there and in persisting to stay there; and I say that, laying aside entirely all the special authorities given by the statute; for I do not think that the case is at all brought within the statute. *Tipper's* character as collector was well known:—he was authorized to collect. He was authorized to distrain without the production of any special warrant. As his authority arose out of a general warrant applicable to all cases, and granted at the time when he was appointed collector, I do not think that he was bound in each individual case to have that warrant with him, or to produce it. However, no demand was made of a warrant, and there was no doubt at all about his character. He had been there in October. Some conversation had then taken place about an intention to distrain, upon which very strong and improper language had been made use of by *Clarke*. The answer which the

collector gave, I do not think imports exactly that he believed the threat would not be carried into execution. It seems to me the natural answer of defiance which a peace officer would give. The answer is, "I shall not be deterred;"—"I am not afraid of your threats;"—"I shall do my duty." However, *Tipper* goes away upon a promise of payment being made. A whole month elapses, during which time no payment is made by *Clarke*. When the collector went again, was he not justified in providing himself with the means of enforcing a distress, or preserving the peace, in case a distress, supposing it to become necessary, should be resisted? I think that he was so. He walks into the house with *Collins*. That is not objected to. The other two persons, one of whom is *Grinder*, are stationed outside in the most inoffensive manner. The bolting of the door by *Clarke* was an unjustifiable act; and it was not until that act was done, that *Grinder*, the person on whom the assault was committed, was introduced. Then *Grinder* and *Holder* are introduced. When they come into the room, *Clarke* returns thither with ten men. This is the state of things which *Grinder* finds when he is in that room. There is then a conversation about payment,—there is language used about *Grinder*, calling him a thief-taker;—which I only mention for the purpose of shewing that they knew who *Grinder* was, and what character he filled;—and then *Grinder* is ordered to withdraw. Now then, I ask, whether, at that moment, *Grinder*, as a peace officer, without reference to any other circumstance, had not justifiable cause for *staying* in that place? His conduct was peaceable; he had entered peaceably after an unjust act was done,—he finds ten men present there, and in strong language he is called on to retire. I think that if he had retired under those circumstances, he would have been wanting in his duty; and that if *Grinder*, *Collins*, and *Holder* had gone out, and afterwards any violence had been committed on the collector, they would all have been chargeable with a very great neglect of duty. Then if

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that he so, *Grinder* was justified in *being there*, and he was justified in *persisting to stay there*; and his justification arose out of his special character as peace officer. That being so, this verdict is properly sustainable on the first count of the indictment.

Rule discharged (a).

(a) The sentence of the Court was then pronounced by *Littledale, J.*, which was, that *Clarke* should pay a fine of 50*l.*, and enter into his own recognizance in the penalty of 100*l.* to keep the peace for years; and that *Austen* should pay a fine of 40*s.*

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An office in a parish, to which the officer may be appointed for any discretionary period, is not an annual office within 3 & 4 *W. & M. c. 11*, s. 6, and 9 & 10 *W. 3, c. 11*.

Therefore a man in fact appointed to and serving such office for a year, and residing within the parish, cannot gain a settlement thereby.

Where, in case of a general appointment to an office, such appointment will enure as an appointment for a year, the office is an annual office within those statutes.

AN order whereby *M. C. Yarwood*, his wife and children, were removed from the township of Church-Hulme to the township of Middlewich, both in Cheshire, was confirmed by the sessions subject, to the following case:—

Both townships support their own poor. The pauper, two years before the date of the order, being then settled in Middlewich, was duly appointed, under the Cheshire Constabulary Act, 10 *Geo. 4*, (local and personal acts,) c. xcvi.(a),

(a) Intituled "An act to enable the magistrates of the county palatine of Chester to appoint special high constables for the several hundreds or divisions, and assistant-petty-constables for the several townships, of that county."

Sect. 1 provides for the appointment of high constables.

Sect. 2 enacts, that the justices for the county, at any quarter-sessions, may—on the recommendation of the justices acting for any hundred or division in the county, as-

sembled in petty-sessions within such hundred or division, not being less than three—from time to time, appoint a proper person, duly qualified, as thereafter mentioned, to be an assistant-petty-constable for any one township, or for two or more adjoining townships within such hundred or division, *for such period as the said justices, at any quarter-sessions, shall think expedient* (except as thereafter mentioned;) and that, upon any vacancy in the office of any such assistant-

assistant-petty-constable for fourteen townships in the county of Chester, of which Church-Hulme was one; and, under that appointment, he served the office for upwards of fifteen months, during the whole of which time he resided in Church-Hulme.

The question for the opinion of the Court is, whether the pauper gained a settlement in Church-Hulme by serving an office in consequence of such appointment, service, and

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petty-constable, by death, *resignation*, efflux of time, or otherwise, the justices at any quarter-sessions may, on the like recommendation, appoint another proper person to be an assistant-petty-constable in the place of the person making such vacancy. Proviso, that no assistant-petty-constable appointed under that act *shall resign his office until* he shall have given to the justices at petty-sessions one month's notice of his intention so to resign.

Sect. 4 requires every assistant-petty-constable to take an oath that *while he continues to hold the said office*, he will, to the best of his skill and knowledge, faithfully discharge all the duties thereof.

Sect. 5 enacts, that such assistant-petty-constable shall have, throughout the whole county, all the powers, authorities, privileges, advantages, and immunities, until legally removed from his office, as any constable has at the common law—and shall be subject to the same penalties for misconduct or neglect of duty.

Sect. 8 enacts, that every assistant-petty-constable to be appointed under this act, shall be liable to execute all the duties which by law do or shall belong to a constable of a township.

Sect. 10 enacts, that the justices at quarter-sessions may *remove* any assistant-petty-constable for any misconduct or incapacity, or in case they shall at any time think that the necessity for the continuance of such an officer has ceased.

By sect. 11, the magistrates in petty-sessions are empowered to suspend any assistant-petty-constable, and appoint another in his place until the next quarter-sessions. And the justices at quarter-sessions are directed to reinstate or *remove* the officer so suspended, as they shall think proper.

By sect. 19, the justices at quarter-sessions are authorized, at the recommendation of the petty-sessions for any hundred or division, to order a *salary* for each assistant-petty-constable appointed under this act, for any township or townships within such hundred or division, provided that *such salary shall in no case exceed the annual sum of 20l. for each township.*

By sect. 20, the justices in petty-sessions are authorized in certain cases to order, for any assistant-petty-constable, in lieu of the salary thereinbefore authorized to be ordered for him, any salary not exceeding 50l. per annum.

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residence? If he did, the order of sessions is to be quashed, if otherwise, to be confirmed.

Waddington, in support of the order of sessions. It is not found that the pauper was appointed *for a year*. Therefore it is sufficient, on behalf of the respondents, to shew that, under the authority of the Cheshire Constabulary Act, the appointment *might* have been *for less than a year*. On the part of the appellants it must be contended that *of necessity* the appointment must have been for a year. Section 2 of the act gives the justices at quarter sessions power to appoint assistant petty constables "*for such period as they shall think expedient, except as hereinafter mentioned;*" that is, subject to the powers given by a subsequent section, to suspend and to remove for incapacity or misconduct, or in case the justices shall at any time think that the necessity for the continuance of such an officer has ceased. So that the appointment may be originally for *any* period of time, however short, *at the discretion* of the justices; and is, moreover, to be *subject to a power of removal* in several cases, one of which is, where the justices *in their discretion* shall think the continuance of the office no longer necessary; and subject also, as appears by other sections, to the right of the petty constable himself to *resign* after one calendar month's notice of his intention, given to the justices at any petty sessions. Although in some respects this petty constable is placed upon the same footing as a constable at common law, yet, as regards the present question, there is absolutely no analogy between the two cases. The oath of an ordinary constable is always that he will duly execute his office during *one year*. Here, the oath is, that *while he continues to hold* the office, he will faithfully discharge the duties thereof. [Lord Denman, C. J. I do not see why it should be called an *annual*, any more than a *weekly*, office.]

He was stopped by the Court.

Evans, contra. This question was not raised at the sessions. It was taken for granted that the appointment, which was produced, was *general*. [Lord *Denman*, C. J. Would not a *general* appointment be bad? Must not the justices appoint for a time *certain*?] It is apprehended that the appointment might be *general*. The act gives a *yearly* salary, which would make a general appointment enure as an appointment for a year at the least. In *Rex v. Lew (a)* it was held, that a party who, having been duly appointed *assistant overseer* for a parish at an annual salary, serves the office for a year, during which time he resides in such parish, gains a settlement. It was held sufficiently to appear that the office was an annual office, from the fact of the salary being annual. [Lord *Denman*, C. J. In that case the pauper was in fact appointed *for a year*. The yearly salary was fixed at 10*l.* on the appointment.] So here, the salary is by the authority of the act of parliament *annual*. [*Coleridge*, J. The act does not authorize the justices to order *an annual salary*, but only to order *a salary*, which, it is afterwards provided, is not in any case to exceed a certain annual sum. *Littledale*, J. The enactment means that the justices may order a salary, *at the rate* of not more than a certain annual sum, to be paid to the officer. *Coleridge*, J. Would an appointment for three months be bad? Certainly not. Then, can it be contended that an officer so appointed must have an *annual salary*? The enactment clearly means *at the rate* of so much a year.] It is not essential that an office should be limited in its duration to a year, for a parish clerk and sexton, though appointed generally, gain a settlement in respect of the service of their office. There was, in this case, a service of fifteen months. The appointment should, in the absence of all other evidence, be taken to have been co-extensive with the duration of the service under it.

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LORD DENMAN, C. J.—If this office had been *in its nature an annual office*, we should have liked to have seen the *appointment* itself. But we think that the office is not in its nature *annual*, but that it is one to which the party may be appointed for *any* period which the justices may, in their discretion, think fit. *Rex v. Lew* appeared to me at first to be an answer to this difficulty; for it seemed to me that the office of *assistant overseer*, (which in that case was held sufficient,) was not in its nature an annual office any more than that of the assistant petty constable here. But I now think that for two reasons that case is quite distinguishable. An *assistant overseer*, when appointed, is to continue to hold his office *until he resigns, or his appointment is revoked*; and his salary is to be a “yearly salary.” His office is, like that of a common overseer, *annual*. And in *Rex v. Lew*, the party was appointed *generally*, and at a *yearly* salary. In this case the duration of the office is in the discretion of the justices, and therefore, I think that even if the justices had, in their discretion, appointed the pauper’s father for a year, his service of the office would not have been sufficient, because the office is not in its nature annual.

LITLEDALE, J.—I am of the same opinion. This case differs from *Rex v. Lew*. The office in that case was, that of an assistant overseer, who is appointed under 59 Geo. 3, c. 12, s. 7, by which the inhabitants of any parish in vestry assembled are authorized to nominate and elect any discreet person to be an assistant overseer, and to determine and specify the duties to be performed by him, and to fix such yearly salary for the execution of the said office as they shall think fit; justices are authorized to appoint, by warrant, according to the nomination and election; and the person so appointed is to continue to be an assistant overseer until resignation or revocation of his appointment. Then inasmuch as the office of *overseer* of the poor is an annual office, the office of *assistant overseer* must

be taken to be such also, though subject to resignation and revocation. Here, however, there is quite a different state of things, for by the words of the act of parliament the original appointment ought to specify the time for which the officer is appointed. This, therefore, is not an annual office.

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PATTESON, J.—I am of the same opinion. *Rex v. Lew* is perfectly distinguishable. An appointment for an assistant overseer for a period less than a year would not be valid. Here, the officer might be appointed for a week.

COLERIDGE, J.—I also am of the same opinion. If the office had been in its nature annual, I should have said that the case ought to go down to the sessions in order that the actual appointment might be brought to our notice. But I think that even if it could be shewn that the party was appointed *for a year*, that would not be sufficient, because the office is not in its nature annual. There is nothing in the act to make it an annual office. An office is *annual* where, if an appointment be made *generally*, it might be legally intended to have been *for a year*.


Order of Sessions confirmed.

The KING v. The Inhabitants of NORTON-BAVANT.

AN order, whereby *John White*, his wife and children, were removed from the parish of Norton-Bavant, Wiltshire, to the parish of Frome-Selwood, Somersetshire, was quashed, subject to the following case:

The pauper's birth-settlement was in Frome-Selwood. About eight years ago the pauper went to one *Gutch*, in the parish of Corslay, to hire himself as a colt shearman. *Gutch* asked the pauper if he liked to work for him for a day on Saturday, so as to make up the ten hours a day, is an "exceptive hiring."

A hiring under which the servant is to work ten hours a day, from five in the morning to six in the evening, and to leave off in the middle of the day on Saturday, so

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twelvemonth, and offered 4s. a week, to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day. The pauper served the year, and slept in the same parish, sometimes at his master's, and sometimes at home. About a month after entering into the service, it was agreed between the master and the pauper that the latter should receive one penny per hour for over-hours; and he continued to receive the same to the end of the year. Sometimes he looked after his master's horse, and sometimes worked in the garden. At the end of the year the pauper agreed with the master to stay on upon the same terms, with the addition of sixpence a week more wages. The pauper served a second year, doing nearly the same work as before. The pauper during both years worked over-hours, at his master's request, and never refused when he was wanted. He was sometimes employed on Sundays, and was paid for so doing. The pauper kept an account of his over-time, by the direction of his master, and was asked by his master if he would sooner do the over-work in his own time, or in his master's. The pauper chose to work his over-hours in the evening. The question for the Court is, whether the pauper gained a settlement by hiring and service in Corslay; if so, the order of sessions is to be confirmed; if not, then quashed.

Bingham, in support of the order of sessions. The sessions have, by quashing the order of removal, in effect found an actual or implied hiring for a year in Corslay. This Court will not disturb that finding; *Rex v. St. Andrew, Cambridge* (a), *Rex v. Rosliston* (b), *Rex v. St. Martin, Leicester* (c). In *Rex v. Ardington* (d), the Court seem to have somewhat relaxed the rule laid down in the three

(a) 3 Mann. & Ryl. 374, and 8 Barn. & Cressw. 664.

(b) 3 M. & R. 420, 8 B. & C. 668.

(c) 3 Mann. & Ryl. 377, and 8 Barn. & Cressw. 674.

(d) 1 Adol. & Ell. 260.

preceding cases, but of those cases only one (the first) was there cited. In *Rex v. Dunsford* (a), in which the question was, whether a particular excavation was a *mine* or not, the Court held that it was a question of fact upon which the sessions, and the sessions only, could decide.

But the principal question here is, whether the hiring in this case was *exceptive* or not. There have been very numerous decisions as to where a hiring is *exceptive* and where not, from which it is impossible, as the Court once observed, to deduce any *principle*. The last case, which is *Rex v. Ossett-cum-Gawthorpe* (b), is precisely on all-fours with this case; or, if there be any difference between the two cases, *Rex v. Ossett-cum-Gawthorpe* is the stronger of the two. The only facts in this case, which tend at all to shew that the hiring was *exceptive*, are facts which occurred *after the hiring*, and which appear to be a mere regulation of the amount of the wages. *Rex v. Byker* (c) is also precisely like the present case.

Barstow, *contra*. With regard to the preliminary objection:—It is clear that the sessions have sent up the contract for the opinion of this Court. It must be tried by the ordinary test, whether this is an *exceptive* hiring or not. The contract, to be a complete hiring for a year, must give the master *dominion* over the servant for one whole year. The contract here, as originally made, gave the master power over the servant only during certain hours of the day; and if he had required the servant to do over-work, the servant might, consistently with the contract, have refused;—he might have answered, that he was free after a certain hour of the day, and after a certain time on Saturday. The work after certain hours was therefore entirely *optional* on the part of the servant. In *Rex v. Birming-*

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(a) *Ante*, 349.

(c) 2 Barn. & Cressw. 114; and

(b) *Ante*, vol. i. 21, and 4 Barn. 3 Dowl. & Ry. 330.
& Adol. 216.


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ham (a), the pauper was hired for a year, by a button caster, at Birmingham, at weekly wages, to work from six in the morning until seven at night, and he was at liberty to make as much over-work as he chose. Nothing was said respecting Sundays, but during the service, if there was any thing to be done on Sunday, he always did it. The pauper served for a year, and did over-work, for which he was paid extra. Upon the argument, the case of *Rex v. Byker* was cited, as has been done here; but *Bayley, J.* there says (b), "This is a very different case from *Rex v. Byker*. A service of more than fourteen hours a day was clearly contemplated there, and the Court thought that the time was mentioned merely as the *measure of wages*; that the contract did not impose *any limits* upon what might reasonably be required by the master, and that the relation of master and servant subsisted during the whole twenty-four hours. Here, the stipulations are, that the servant shall receive fixed wages; that he shall work from six in the morning till seven in the evening, and that he may make as much over-work *as he chooses*. But he could not have been *compelled* to make any over-work. He had a right any and every evening to say to his master, "I have worked thirteen hours to-day, and I will work no more till to-morrow." This is clearly an exception in the contract, limiting the contract of the master over the servant to thirteen hours a day."

Lord DENMAN, C. J.—I think it impossible for us to say that we are bound by the decision of the sessions. The sessions have found that there was a birth-settlement in the appellant parish, and a subsequent settlement by hiring and service in the respondent parish, *provided* this Court is of opinion that the hiring which they have stated amounts to a hiring for a year. The Court is therefore bound to inquire whether it is such a hiring or not.

(a) 4 Mann. & Ryl. 691, and 9 (b) 4 Mann. & Ryl. 694.
 Barn. & Cressw. 925.

We should find it very difficult to reconcile all the cases which have been decided as to *exceptive hirings*. This case is, however, precisely governed by *Rex v. Birmingham*, for the facts are quite the same. *Bayley, J.*, in that case, distinguishes it from *Rex v. Byker*, which had been cited. Here the master asked the pauper if he liked to work for a twelvemonth, and offered 4s. a week to work ten hours a day, from five o'clock in the morning till six in the evening, and to leave off in the middle of Saturday, so as to make up the ten hours a day. There was a part of the week during which the pauper was not bound to work for his master. That which took place after the original agreement forms no part of the contract. We are pressed with the authority of *Rex v. Ossett-cum-Gawthorpe(a)*. In that case we did not intend to overrule *Rex v. Birmingham*:—on the contrary, it is expressly mentioned and distinguished in the judgments. The distinction between the two cases, is, I admit, a refined one, and one of our learned brothers(b) thought that we were wrong. There, however, the contract certainly was different from that upon which the question turns here. In that case there was a *general hiring* for five years stated, and then followed *certain arrangements* as to the amount of the wages. Here the *actual contract* of hiring itself is to work for ten hours a day only. Therefore, without interfering with any of the decisions referred to, we may hold that this is an *exceptive hiring*.

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LITLEDAL, J.—I am of the same opinion.

PATTESON, J.—I also am of the same opinion. I do not think that the sessions can be said to have found that this was a hiring for a whole year; for they have asked us to decide whether it is so or not. We distinguish between *Rex v. Birmingham* and *Rex v. Ossett-cum-Gawthorpe*. In that latter case I was not much pressed by *Rex v. Birmingham*.

(a) *Suprà*.

(b) *Taunton, J.*

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ham, but was more so by *Rex v. Frome-Schoood(a)*. The question, whether a contract of hiring is exceptive or not, depends upon whether over-work is *optional* or not, on the part of the servant. In *Rex v. Ossett-cum-Gawthorpe* it was *not* optional. We all agreed there as to the principle, though we differed as to the facts. *Here* the over-work is optional.

COLERIDGE, J.—It is quite trifling to say that there has been any finding by the sessions which can prevent our going into the inquiry whether this is an exceptive hiring or not. They leave the question entirely open to us.

There is, no doubt, a difficulty in reconciling all the cases upon this subject, but at the same time there is no class of cases in settlement law on which the *principle* is better settled. The difficulty arises from the courts having, upon the same facts and the same principles, come to different conclusions. It would have been better if the sessions had found, upon the settled principle, that the hiring was exceptive or complete for a year. The principle being settled, is it possible for any one who reads this case, without referring to other decisions upon the subject, to doubt that this is an exceptive hiring. During all the time beyond the stipulated hours the pauper was his own master. He might have gone away, and have worked wherever he would. This was clearly an exceptive hiring. That which came after the original contract in this case, shews what was the understanding of the parties. A distinction was then acknowledged by them between master's time and servant's time.

Order of Sessions quashed.

(a) 1 Barnw. & Adol. 207.

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AN order, whereby *John Porter*, his wife and children, were removed from the parish of Fordham, Cambridge-shire, to St. Mary, Newmarket, Suffolk, was quashed, subject to the following case:

The pauper never gained any settlement in his own right. The pauper's father being settled in the appellant parish, went to reside in the respondent parish under a certificate; and whilst so residing, served there for two years the office of pinder, to which he was appointed at a court-baron, held for the manor of Fordham-Biggen, on 5th September, 1787; the appointment being entered on the court rolls in the following words:—

“ And lastly, the said homage did elect *John Porter* pinder for the town of Fordham, for the year ensuing, and until another person be chosen in his stead; and the said *John Porter* came into court, and was sworn duly to execute the said office.”

The first entry on the court-rolls of this manor, which can be found, of the appointment of any officer, is at a court-baron, held 1st November, 1693. From that period to the year 1810, (when the parish of Fordham was inclosed,) there were four courts-leet with courts-baron, and a great majority of courts-baron without a leet(a), at which the pinders and other officers of the manor were appointed and sworn in. In the instances of courts-leet and courts-baron being held together, (save one, where the pinder was appointed by the homage only,) the pinder and other officers of the manor were elected by the jury of the leet.

From 1739 to 1794 there were eight consecutive courts-

(a) *Quere*, whether an appointment at a court-baron of a public officer, even for the manor only, could be supported by custom; and, *quere*, whether what is here called a court-baron may not have been

a customary court, viz. the court of the copyholders, and not properly a court-baron, which is the freeholders' court. See 5 Mann. & Ryl. 148 (a).

No settlement is gained by the execution of an office (e. g. that of pinder,) for a town, to which the party is appointed at a court held within and for a manor, which manor does not extend over the whole town, and there being no special custom warranting such appointment.

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baron, at which certain persons were, in like manner as the pauper's father, elected pinders by the homage and sworn in, and there is not one instance on the court rolls of any such appointment at a court-leet, held as such only. There are in all five manors in the respondent parish, of which the manor of Soham-and-Fordham is the most extensive, but there is no paramount manor. Previously to the inclosure of the parish there were three commons in the manor of Fordham-Biggen, over which the inhabitants of Fordham had common rights. There were also two pounds; one belonging to the manor of Fordham-Biggen, the other to the manor of Soham-and-Fordham.

The question is, whether the pauper's father was legally placed in the office of pinder under the above appointment, so as to confer upon him a settlement in the respondent parish.

The above case was, in pursuance of a writ of certiorari, transmitted to this Court, and was, by an order of this Court on 5th May, 1832, sent back to the sessions, in order that they might inquire whether the *town* of Fordham was co-extensive with the *parish* of Fordham, and was more or less extensive than the *manor* of Fordham-Biggen.

And at the Court of Quarter Sessions, held 6th April, 1833, the said Court found that the *town* of Fordham was co-extensive with the *parish* of Fordham, and was more extensive than the *manor* of Fordham-Biggen. And it *confirmed* the said order of removal.

Biggs Andrews, in support of the order of sessions. The Court, on a former occasion, said that if the town of Fordham were co-extensive with the parish of Fordham, and were more extensive than the manor of Fordham-Biggen, the appointment of the pauper's father would clearly be bad; and, because these facts were not sufficiently stated in the case, it was sent back to be re-stated. The *homage*, at a court-baron of one manor, cannot legally appoint a pinder for a parish or town, in which there are contained


several other independent manors. Indeed, there appears to be no authority to shew, that a court-baron can appoint any officer whatever. An office must be derived immediately or mediately from the crown. Therefore, though a court-leet may appoint an officer, a court-baron may not do so. If a pinder be an officer, he cannot, therefore, legally be appointed at a court-baron; if he be not, then a party can gain no settlement in respect of his performance of his duties as such officer. A pinder, especially where appointed at a court-baron (which is a private Court), is, at all events, not a "*public annual officer in a parish*," within 3 *W. & M.* c. 11, s. 6, and 9 & 10 *W.* 3, c. 11 (a).

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LORD DENMAN, C. J.—Mr. *Kelly*, can you maintain this position, that the homage of one manor can appoint a pinder for a parish containing several other manors?

F. Kelly and *J. Smith*, contra. There may be a custom to that effect, and such a custom would be good. No such custom is stated, but the existence of such a custom may be collected from the facts which are stated in this case. It should have been left to the sessions to find whether there was a custom, or not. It is prayed that the case may again be sent back to the sessions, in order that this point may be ascertained. [Lord Denman, C. J. It is clear that the Court, on the former occasion, thought the facts which have now been found, upon sending back the case to be restated, would be decisive of the case; and we think so too. It is a great pity that it was not then conditionally decided.] It must be admitted that, unless there be a custom to warrant it, the appointment is illegal. [Lord Denman, C. J. I admit that it is not necessary that a man should be appointed to an

(a) The 3 *W. & M.* c. 11, speaks of "a public annual officer or charge in any town or parish;" but in 9 & 10 *W.* 3, c. 11, which applies specially to certificated persons, the word "public" is omitted.

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office extending over the whole parish, but if he be appointed to the whole parish, he must shew that he has been legally appointed to the whole parish.]

Per Curiam.

Order of Sessions confirmed (a).

(a) And see Scriven, Copyh. 3d ed. 867.

DOE d. HERBERT HERBERT v. LEWIS and THOMAS.

A. devises a house, &c. "to B., his heirs and assigns, for ever, with the intention that he may enjoy the same during his life, and by his will dispose of the same as he thinks proper." B. takes an estate in fee, and not an estate for life with a testamentary power of appointment.

EJECTMENT for tenements at Crickhowell in the county of Brecon. At the trial at the Brecon Spring assizes, 1834, before Gurney, B. the will of *Herbert Herbert*, the father of the lessor of the plaintiff, who died in October, 1813, was put in on behalf of the plaintiff, and it was also shewn that *Margaret Herbert*, the devisee named in that will, entered upon the premises in question under it, and died, having, by her own will duly attested, devised to the lessor of the plaintiff. The first will was as follows:—

"I give and bequeath to my dear wife *Margaret*, her heirs and assigns, for ever, the house in which we now live, and all the furniture therein, and all other the property of which I may die possessed, with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper. And whereas my father did, by his last will, give and bequeath to my sister *Susanna Lewis* the house next to mine, and in which she now lives;—now, in case the said will should not be sufficient for the purpose of giving her the said house as aforesaid, I do hereby, as far as in me lies, give and bequeath to her the said *Susannah*, her heirs and assigns, for ever, the said house in which she lives, delinquishing all right and title to the same which I may have. As witness my hand,

"*H. Herbert.*"

The defendants shewed a conveyance of the premises in fee to one of them by *Margaret Herbert*. On the part of the plaintiff it was contended, that *Margaret Herbert* took

only an estate for life, with a testamentary *power of appointment*, and that, therefore, the conveyance could, at the most, operate only on her *life estate*. The defendants contended that *Margaret Herbert* took an estate in fee, which therefore passed to them by the conveyance. *Gurney, B.* decided the question, *pro formâ*, in favour of the plaintiff, and directed the jury to find their verdict accordingly, but gave the defendants leave to move to enter a verdict for themselves. In Easter term, 1834, *John Evans* obtained a rule to enter a verdict for the defendants; against which

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Wilson and *C. Cooper* now shewed cause. The widow took only an estate for life, with a general testamentary power of appointment in fee, to take effect, of course, after her death. The devise, if it had stopped at a certain point, would beyond all doubt have given an estate in fee; but the effect of the previous words of inheritance is cut down by the words, "with the intention that she may enjoy the same *during her life*, and by her will dispose of the same as she thinks proper." In an *Anonymous* case in 3 *Leonard*(a) it was held, that where a testator devised "to his wife for life, and after her decease she to give the same to whom she will," the wife took an estate for life only, but with an authority to give the reversion to whom she pleased. In *Jennor and Hardie's* case(b), the following decision(c) is cited from the Year Book, 15 *H.* 7, 12. "A man deviseth, that *A.* shall have his lands *in perpetuum during his life*. He hath but an estate for life, for the words "during his life," do *abridge* the interest given before." The words, "heirs and assigns," may as well be restrained as the words "in perpetuum" in that case. If the

(a) 3 *Leon.* 71, pl. 108.

(b) 1 *Leon.* 283.

(c) Not a *decision* but a case put by *Fineux, C. J.* by way of illustration. *Vide Trin.* 15 *Hen.* 7, fo. 12, pl. 22. This was before

the statute of wills, (32 *Hen.* 8, c. 1,) but *Fineux, C. J.*, was speaking of the devise of a *use*. As to limitations of uses in wills, *vide* next note.

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devise here had been in this form, "I give to *A. B.*, her heirs and assigns for ever, *to the use of* herself for life, remainder to the use of such persons as she may by her will appoint;" there could have been no doubt but that the devisee would have taken no more than an estate for life, with a power of testamentary appointment over(*a*). The language which has been used in this will, is such as it is not unlikely that an unlearned testator would employ when intending to give such an estate. In another part of the will, the testator, intending to give a fee simple, uses merely the ordinary words of inheritance. And it has been held that under the statute of uses any words of *intention* may be equivalent to the formal words, "to the use of." Some doubt was certainly thrown on the case in *3 Leon.* 71, in *Goodtitle v. Otway*(*b*), but its authority has been recognized in various cases, as in *Tomlinson v. Dighton*(*c*) and *Doe v. Thorley*(*d*), which is much like the present case. The Court will give effect to the whole will if they can, and if its language be inconsistent they will reject the least material words. The *intention* of the testator is clearly expressed by himself to be, that his widow should take, not an absolute estate in fee, but an estate for life, with a power of appointment of the reversion *by will only*; and it is reasonable to suppose that he intended that his children should take, unless his widow devised. The various cases upon this subject are quoted and commented upon in *Sugden on Powers*, 103.

LORD DENMAN, C. J. (stopping *J. Evans* and *E. V. Williams*, *contra*.)—I believe we all think it perfectly clear that the widow took an estate in fee. If we were to hold otherwise, it must be at the expense of rejecting the important words, "heirs and assigns," and that, too, for the purpose of giving effect to words which are, in reality, not in-

(*a*) It is here assumed that limitations of uses in wills operate under the statute of *uses*; *sed vide ante*, vol. i. 175, n. 176, n.

(*b*) 2 Wils. 6.

(*c*) 1 P. Wms. 149.

(*d*) 10 East, 438.

consistent with the supposition that a fee passed. The only case that excited any doubt in my mind during the argument was that in 3 *Leonard*. Upon looking into that case, I think it perfectly plain that it is no authority for the plaintiff. On the contrary, the opinion of the Court on another supposed state of facts is in favour of the defendant. There is nothing there of "*heirs and assigns*," but the case was this: — A., seised of lands in fee, devised them to his wife *for life*, and after her decease she to give the same to whom she wished. The Court there appear to have held that by that devise the wife had but an estate for life, with an authority to give the reversion to whom she pleased; and then they concluded by saying, that "if an express estate for life had not been appointed to the wife, by the other words an estate *in fee* simple had passed;" that is, by the words enabling her to give the same after her decease to whom she pleased. So that, according to the opinion of the Court, even *without* the words "*heirs and assigns*," there would, but for the express limitation to the wife for life, have been an estate in fee.

LITLEDALE, J.—I am entirely of the same opinion. I think that this case in *Leonard* bears the construction which my Lord has put upon it. The subsequent provision in the will is not inconsistent with the devise in fee. It gives the widow permission to occupy the house during her life, and after her death to dispose of it by will. That she had before by the devise in fee. If it had *abridged* any of her power, that might have been evidence to shew that the intention of the testator was not to give a fee. So, if the estate had been limited over after giving the fee. As in *Chycke's* case(a), where *William Chycke*, seised of the fee of a messuage in London, devised it by these words, viz. "Item, I give the *fee simple* of my bigger house, in Soper Lane, to my cousin *Alice Ludlam*, and after her decease to *William L.* her sonne (which *William* was her heir appa-

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(a) Dyer, 357, a.

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rent), and dies;"—and the opinion of the Court was, that the wife should only have the estate for the term of her life, remainder to *William* her son in fee.

In the margin of the report of that case, there is a note (well known to be Chief Justice *Freeman's*), which is as follows:—"A. seised of Blackacre and of a house, devises all his lands and tenements to C. in fee, and afterwards, in the same will, he devises his house called the Swan, now in the tenure of J. S., to D. for ever. Inter alia, it was resolved that D. has fee in the house. *Chamberlain v. Turner*, 4 Car. 1, K. B. Cro. Car. 129, a. *Whiting's case*, 11 Jac. K. B.; a devise to A. in perpetuum is a fee, but if it be limited after the death of A. to B. in fee, then A. has only for life."

It appears from this case that if an estate, after being first limited in fee simple, is afterwards devised over to another, there may be some doubt entertained as to whether the first devisee takes a fee or not. That would depend on the words in each case. There is nothing of doubt here. Here is first a devise of a fee simple, and the words that are superadded are, that the wife shall have permission to do what she could do without that permission,—first to reside on the premises for her life, and afterwards to dispose of it at her death.

PATTESON, J.—I am entirely of the same opinion. The cases that have been cited only go the extent of shewing that where there is an express devise *for life*, a power to dispose of the same property by will, superadded, will not increase it into an estate in fee. They go no further than that. Here an express estate *in fee* is first given. No doubt proper words may cut down an estate given in fee to an estate for life. There are many cases of that sort where such a construction may be put on a will. One such case occurs to me immediately, *Barker v. Barker* (a), which is very well known. In that case there was a devise to A. and her

(a) 2 Simons.

heirs, and if she died leaving issue, then to such issue and their heirs. She did die leaving issue, and it was held that the husband of *A.* was not tenant by the courtesy, for that *A.* took as tenant *for life* only. I find no such words here. There is no devise over to any body else, nor are there any express words cutting down the devise in fee, but merely an intention expressed. The words are, "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper," all of which she could do as tenant in fee simple.

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COLERIDGE, J.—I am of the same opinion. I see no difficulty in this case. The devise is, in the first instance, to the wife, *her heirs and assigns*. I do not mean to say that if other words had followed, which shewed that it was the testator's intention that she should not have so large an estate, the effect of the first words might not be *limited*. But the following words, in order to have that effect, ought to be clearly inconsistent with the supposition that an estate in fee simple was intended to pass. These words fairly admit of a *consistent* interpretation.

Rule absolute. (a)

(a) And see *Goodtitle v. Otway*, 2 Wils. 6; *Wright v. Atkyns*, Turner & Russ. 143.

MEAD v. DAVISON.

ASSUMPSIT on a policy of insurance on the ship "Crisis," for an average and for a total loss. Plea: Non 1. A policy of insurance on a ship "lost or not lost," executed, after the ship is known by all the parties to be lost, in pursuance of a previous agreement to insure, is valid.

Where, by the rules of an Insurance Association, insurances are to commence on the day on which the ship is *accepted* by the committee, and to continue in force for twelve months, a ship accepted in February and lost in June is well insured by a policy executed 3rd October.

And no objection to its admissibility in evidence arises upon the Stamp Act, 35 Geo. 3, c. 63.

2. A letter of attorney was given to execute policies in conformity with the above rules:—Held, that the execution of the above policy was thereby authorized.

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assumpsit. At the trial before Lord *Lyndhurst*, C. B., at the Surrey spring assizes, 1834, it appeared that the plaintiff and defendant were members of a mutual insurance company, called "The British Association," whose affairs were managed by a committee. The members of the Association undertook to insure their respective ships, subject to certain rules; one of which was, that the insurance on each ship should commence from the day of her being *accepted* by the committee, and should continue in force for twelve months from that time. Each member authorized the committee, by power of attorney, to execute for him policies of insurance, conformably to the rules of the Association. On the 15th February, 1829, "*The Crisis*" was *accepted* by the committee. Between the 5th and 15th days of June, 1829, an average loss, and subsequently, a total loss of the ship occurred. On the 21st October, 1829, a policy of insurance was *subscribed* by the committee in the name of the defendant and other members. The policy was on the ship *Crisis*, "lost or not lost," beginning the adventure at twelve o'clock at noon of the 15th February, 1829, and to endure until twelve o'clock at noon of the 15th of February, 1830. At the time when the policy was executed, all the parties were aware that the loss had taken place. It was objected on the part of the defendant, first, that a party could not recover upon a policy executed after the loss had actually taken place, all parties being then aware that the loss had occurred; and secondly, that the power of attorney did not authorize the execution of this policy. Lord *Lyndhurst* nonsuited the plaintiff upon the first objection, but gave him leave to move to set that nonsuit aside and enter a verdict for himself. *Platt* having obtained a rule nisi to set aside the nonsuit and for a new trial,

Thesiger and *Massy Dawson* now shewed cause. There are two questions for the decision of the Court: first, whether the plaintiff is entitled to recover upon a policy of insurance subscribed after the loss had actually

occurred, all parties being aware of that fact; and secondly, whether the letter of attorney authorized the agent to execute this policy for his principal, after he, the agent, was apprized that the loss had occurred.

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I. The plaintiff may rely on the words "lost or not lost," which are introduced into the policy, but those words are adapted only to meet the case of a loss, of which the parties were *in ignorance*, occurring before the execution of the policy. In *The Earl of March v. Pigot (a)*, in which the assured was allowed to recover on a policy containing similar words, executed after a loss, but at a time when neither party was aware of that fact, it was said *(b)* that if those words had been omitted in a ship-policy, and the ship was lost at the time when the insurance was effected, it would have been void. A policy of insurance is a contract of *indemnity*, and cannot therefore apply to circumstances where the loss has occurred, and is known to have taken place, previously to the inception of the contract. To permit this policy of insurance to be given in evidence, would be a direct contravention of the policy of the Stamp Act, 35 Geo. 3, c. 63. From sections 11 and 14 of that statute, it is apparent that it was the intention of the legislature that a policy of insurance should be subscribed and stamped at the time when the contract of insurance is entered into. In *Roderick v. Hovil (c)* it was held, that although a policy of insurance produced at the trial of an action had a sufficient stamp, evidence might be received to shew that it had no such stamp when it was effected; in which case it was a mere nullity, though stamped afterwards by order of the commissioners of stamps; for that this was forbidden by 35 Geo. 3, c. 63, and not authorized by 37 Geo. 3, c. 136. It may be contended that the *acceptance* of the ship in February was sufficient to constitute a contract of insurance. The acceptance by the committee can have no greater effect than the "slip" which is usually signed by underwriters pre-

First point:
Insurance
after know-
ledge of loss.

(a) 5 Burr. 2802.

(c) 3 Campb. 103.

(b) By *Lee* arguendo.

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viously to the making of a policy, and which contains the terms of the contract. In *Warwick v. Slade* (a) Lord *Ellenborough* said, that until the stamped policy was signed by the underwriters, no binding contract was entered into, and that the revenue laws forbid him to look at what is called the *ship*. If the mere naming of the vessel by the assured, and the acceptance of the vessel by a committee (as in the present case), be held sufficient, parties will never in future execute a stamped policy, and thus the revenue will be defrauded and the policy of the law frustrated.

Second point:
 Power of at-
 torney.

II. The power of attorney merely authorized the party to insure against *contingent* losses, not to enter into a contract of insurance where the loss had actually happened.

Platt, in support of the rule.

First point.

I. The insurance is, by the rules of this Association, to commence from the day of *acceptance*. The ship was accepted in February, 1829, but the mere *form* of executing a policy of insurance was not then completed. The policy was *executed* after the loss; but a policy may be available notwithstanding that it has a retrospective operation. If this were a wagering policy, it might be objected to; but the words, "lost or not lost," provide for the case of the vessel's being lost at the time when the contract is entered into. [Lord *Denman*, C.J. Do they not rather provide for the event of a loss *not known* to the parties at the time of insurance?] Whether the vessel is lost or not, is not of the essence of a contract of insurance. It is contended that this is in contravention of the Stamp Act. All that the act requires, and all that the legislature intended, was, that a policy of insurance should be stamped previously to its *execution*. *Roderick v. Hovil* only decided that a policy of insurance could not be stamped after it was executed. It does not bear upon the point in this case.

Second point.

II. The power of attorney enabled the agents to execute policies; and their authority was subject to no restrictions

(a) 3 Campb. 127.

beyond those imposed by the rules of the Association. If knowledge of the loss be no objection to the policy, assuming it to be duly executed in other respects, so neither is it an objection to the execution of that policy by the agent.

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Cur. adv. vult.

Lord DENMAN, C.J., in the course of the term, delivered the judgment of the Court as follows :

This was an action on a policy of insurance on the plaintiff's ship. He and the defendant were members of an association for mutual insurance. The ship was accepted in February, 1829, when the premium was paid, and the insurance was to take effect for twelve months from that date. The policy was formally executed in October, 1820, and that not by the defendant himself, but under a power of attorney, and according to the rules of the society; and the ship was in fact lost, and known by all parties to be so before execution of the policy. On these facts being proved, Lord *Lyndhurst* directed a nonsuit; on a rule for setting aside which and entering a verdict for the plaintiff, the case has been fully argued before us.

The material question in this case was, whether an assured can recover on a policy executed after the loss has occurred and become known to both parties. Now the case of *Lord March v. Pigot*, referred to in the argument, is a decided authority in principle in favour of the right to recover, if the loss was known to *neither* party at the time of effecting the policy. According to the same case, and indeed on the plainest general principle, if the loss were known *to the assured only*, the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. This conduct might indeed appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz. the payment of the premium, which may be regarded as a price actually given and received for the under-

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writer's indemnity against the contingency that has arisen. There is considerable analogy between this case and *Paine v. Meller* (a), decided in 1801 by Lord *Eldon*, who held the purchaser bound to perform his contract, though the house was burnt before the time appointed for conveying it. "As to the mere effect of accident," said his lordship, "no solid objection can be founded upon that simply; for if the party, by the contract, has become in equity the owner of the premises, they are his to all intents and purposes." (b) He also said, (adverting to the case of annuities, where the purchasers have been compelled to pay the purchase money, though the grantor died before he had made a single payment,) "the party has the thing he bought, though no payment may have been made; for he bought subject to contingency." So in the present case the plaintiff bought and paid for the underwriter's promise to indemnify. (c) If his ship had arrived, the underwriter would have kept the whole premium. Though she has perished, he cannot be relieved from his agreement. Equity would have compelled him to execute the formal policy whenever tendered to him. In voluntarily executing he has only performed a manifest duty, and cannot now retract the obligation.

The case of *Jeffreys v. Legendre*, cited from Shower's Reports, (and reported, for the judgment only, in Lord Holt's Rep. 465,) seems inapplicable, as it only proves that a vessel *sails* with convoy, if she *departs* with convoy and is accidentally separated by stress of weather. *Roderick v. Hovil* and *Warwick v. Slade* have no bearing on the present question. In the former, it was established that a policy executed without a stamp is void, though stamped before the trial; in the latter, that a broker cannot recover premiums paid for insurances effected after his authority to insure had been revoked. Here, the stamps were correct, and the authority was never revoked.

(a) 6 Ves. 349. And see the cases collected, Mann. Dig. 189, gison & Rawle, 11.

(b) *Vide Foster v. Foust*, 2 Ser-

(c) *Vide Pothier, Traité de Constitution de Rente*, No. 218.

The defect of stamps was urged as a preliminary objection, but it is answered by the foregoing observation.

Another preliminary objection was founded on the execution of the policy under a power of attorney supposed not to warrant the execution of such a policy as this. Upon reference however to the instrument, we are of opinion that it did authorize the agent to execute a policy granted, as this was, upon the usual terms of the Association.

Rule absolute.

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NECK v. HUMPHREY and another, Sheriff of Middlesex.

CASE for an escape, with a second count for not taking. At the trial before Lord Denman, C.J., the plaintiff proved that a *capias ad respondendum* had issued to the defendant, in an action by Neck against Burton and others; that the sheriff had returned *cepi corpus et paratum habeo*; and that inquiry had been made at the sheriff's office for the bail-bond, in order to take an assignment of it, but that an officer there had denied that there was any such bail-bond in the office. Platt, for the defendant, objected that there was no evidence of an escape. Lord Denman refused to stop the cause, but gave the defendant leave to move to enter a nonsuit in case a verdict should be found for the plaintiff. The jury found for the plaintiff, damages 40s.; and Platt, in the following term, obtained a rule nisi for a nonsuit.

A return of *cepi corpus et paratum habeo*, together with a statement at the sheriff's office that there was no bail-bond, is evidence of an escape.

Massy Dawson now shewed cause.

Platt, in support of his rule. The plaintiff put in the sheriff's return of *cepi corpus et paratum habeo*. The return of *paratum habeo* is a direct contradiction of the supposition that there had been an escape. The return means, legally, that the sheriff has taken the defendant, and

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that he has him in custody, and is *ready to produce him*. [*Littledale, J.* Does not *cepi corpus et paratum habeo* mean that the sheriff has taken the defendant, and that he is at large upon bail? He ought to return the defendant *in custody*, if that be the fact. I have always understood that this return implies that the defendant is *at large*.] *Quâcunque viâ datâ*, the return negatives a permissive escape. It implies either that the defendant is *in custody* ready to be produced, or that he is out *upon bail*. [*Coleridge, J.* Would that return be evidence of a bail-bond taken?] If the plaintiff puts it in as evidence of a caption, in an action against the sheriff for an escape, the *whole* return must be taken together, and therefore the latter part will be evidence for the sheriff. [*Patteson, J.* It does not necessarily follow, when the sheriff returns *cepi corpus et paratum habeo*, that he has taken a bail-bond. He may have allowed the defendant to be at large, intending to put in bail, when required, if he *can* do so.] The return implies, at all events, that the sheriff has *control* over the body of the defendant. If the sheriff had returned falsely *cepi corpus et paratum habeo*, or if he had refused to assign the bail-bond, an action for a false return or for refusing to assign the bail-bond, would have lain; but on the face of this return it cannot be said that there was evidence of an escape.

LORD DENMAN, C. J.—At the trial, when Mr. *Platt* applied for a nonsuit, there *was* some evidence of an escape. The sheriff had returned *cepi corpus*, and a witness had proved that there was no bail-bond in the office.

LITTLEDALÉ, J.—I also think that there was evidence for the jury in support of the count for an escape.

PATTESON, J., and COLERIDGE, J., concurred.

Rule discharged.

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In the matter of CLARKE.

MR. CLARKE had given a notice, in pursuance of Reg. T. 31 Geo. 3, r. 3, of an intention to apply in Trin. term to be admitted an attorney of this Court. In that part of the notice which professed to state the name of the attorney to whom Mr. Clarke had been articled, the name of another person (with whom he *resided*) had been inserted *by mistake*. Upon an affidavit stating these facts,

Where in a notice given at the commencement of Easter term of the intention of A. to apply to be admitted an attorney of K. B., the name of another individual was inserted *by mistake* in lieu of the name of the person with whom A. had served his articles,—the Court, upon an application in Easter term, allowed the notice to be amended, in order that A. might be admitted on the last day of Trinity term.

W. J. Alexander now applied to amend the notice. The alteration which it is proposed to make in this notice, is the substitution of the name of the real master for that of the person whose name, through a mere mistake, now appears as such. The rule requires that the notice shall be posted up during one whole term immediately preceding the term in which the party applies to be admitted. Therefore unless the Court sanction the proposed alteration, Mr. Clarke cannot apply to be admitted until after the long vacation. If the Court make it a condition that Mr. Clarke shall not apply to be admitted until the last day of Trin. term, the object of the present application, and that also of the rule of court, will be gained. [Coleridge, J. There is a case of *Ex parte Lambert* (a), in which a notice of application to be admitted one of the attorneys of the Court of C. P., having been by mistake left at the chambers of one of the judges of the Court of K. B., instead of those of the lord chief justice, the Court allowed the party to be admitted, on an affidavit disclosing the fact.]

Lord DENMAN, C. J.—In a note book of Mr. *Le Blanc* there is this note :—"Attorney's admission. In one case the party had omitted to insert the place of abode of the attorney with whom he served. This was stuck up before

(a) 3 Moore & Payne, 269.

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Easter term; and *Nolan* moved, in Easter term, that it might be altered and the party admitted. The Court allowed it to be done; but said that he must be admitted the last day of Trinity term. *Ex parte Jones*, Easter term, 1819." That appears to be a case in point. Mr. *Clarke* may be admitted on the last day of Trinity term.

PATTESON, J.—The rule had better be to amend the notice.(a)

Rule accordingly.

(a) This is stated to have been the form of the motion as made by *Alexander*; *sed quare*.

—◆—

KITCHENER and others, Assignees &c. of H. DEAN, a
 Bankrupt, v. POWER.

In all actions by assignees of a bankrupt, which the bankrupt himself might have maintained, if no bankruptcy had occurred, the depositions taken before the commissioners are conclusive evidence of the trading &c., although at the time of the bankruptcy the cause of action may not have been complete.

And the question whether the action is of such a nature, must

be decided by a reference to the facts of the case, (which the judge may collect from the opening of the plaintiff's counsel,) and not from a strict reference to cause of action appearing on the record.

Therefore, where in trover by assignees the conversion was laid after the bankruptcy, it was held that the plaintiffs were not precluded by the form of the record from having the depositions admitted as conclusive evidence.

TROVER for bacon. The first count alleged a possession by *Dean* before, and a conversion by the defendant after, the bankruptcy. The second count stated a possession by the plaintiffs as assignees, after the bankruptcy, and a subsequent conversion. Plea: not guilty. At the trial before Lord *Denman*, C. J., at the sittings in London, after Hilary term, 1834, it appeared that the action was brought to recover the value of fifty bales of bacon, purchased of the bankrupt by the defendant for cash, which the defendant refused to pay, on the ground that he was entitled to set it off against certain running acceptances of the bankrupt, which he then held; and the questions intended to be raised in the cause were, whether the defendant had not purchased the goods professedly for cash (b), but with an

(b) *Vide Lechmere v. Hawkins*, East, 130, 138; *Peele v. Northcote*, 2 Esp. N. P. C. 626; *Eland v.* 7 Taunt. 479; *Flint*, *Ex parte*, 1 *Kair*, 1 East, 375; *Taylor v. Okey*, Swanst. 30.
 13 Ves. 180; *Fair v. M'Iver*, 16

intention *not* to pay cash, but to set off the amount against the acceptances, and whether, if so, the plaintiffs were not entitled to disaffirm the contract as tainted with fraud, and consequently to maintain trover for the value of the goods. Notice of an intention to dispute the act of bankruptcy and petitioning creditor's debt had been given by the defendant (*a*), and the plaintiffs offered to put in the depositions taken before the commissioners as conclusive evidence of these facts. It was objected by the defendant that this was not an action which the bankrupt himself could have sustained, so as to bring the case within the 92d section (*b*) of the Bankrupt Act (*c*), and that therefore the depositions could not be read. The learned Chief Justice was however of opinion, that if the assignees were entitled to disaffirm the contract, the bankrupt himself, had no bankruptcy intervened, would have been equally entitled to do so, and that therefore the depositions ought, according to the 92d section of the act, to be received. The depositions were accordingly put in and read, and the case proceeded upon the merits, no other evidence of the act of bankruptcy or petitioning creditor's debt having been given. It was subsequently objected by the defendant's counsel, that as *upon the record* no cause of action in the *bankrupt* appeared,—the conversion being in both counts laid subsequently to the bankruptcy,—it could not be said that the action was brought for any demand for which the bankrupt might have sued, and that consequently there was no legal evidence of an act of bankruptcy or petitioning creditor's debt. The plaintiff's counsel answered, that in the first count a cause of action in the bankrupt appeared, for that a possession by him was there alleged, and that the allegation of

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(*a*) If this case had not been held to be within the *ninety-second* section, which renders the depositions conclusive in certain cases, (whether notice to dispute has been given or not,) the effect

of the notice would have been to relieve the defendant from the operation of the *ninetieth* section.

(*b*) Which see *post*, 716.

(*c*) 6 *Geo.* 4, c. 16.

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a conversion was so made, that the count might be supported by proof of a conversion before the bankruptcy. The learned Chief Justice was however of a contrary opinion, and called upon the plaintiffs to prove by witnesses an act of bankruptcy and a petitioning creditor's debt. The plaintiffs failed to prove an act of bankruptcy, and Lord Denman, upon the authority of *Jones v. Fort(a)*, directed a nonsuit. In the following term Sir James Scarlett obtained a rule to set aside the nonsuit, and for a new trial; against which, in last Hilary term,

Pollock, A. G., shewed cause. The question turns upon the statement of the cause of action upon the record. The second count may be left entirely out of consideration, as that count is founded altogether on a supposed title in the assignees. Then what is the cause of action which appears in the *first* count? That count states in effect this—"These goods were the bankrupt's. You have, *since the bankruptcy*, converted them to your own use." How can it be said that this conversion ever gave a right of action *to the bankrupt*? [*Littledale, J.* Is the question limited thus by the form of the declaration? It is a question whether you might not, under such a count as this, prove a conversion in the time of the bankrupt.] It is submitted that under this count assignees can have no right to prove a conversion before the bankruptcy. A count might easily be added to *meet* such a state of facts. But further, there was *in fact* no conversion before the bankruptcy. This was an action brought to recover the value of goods *delivered upon a contract*, in consequence of a supposed right to repudiate the contract, on the ground of the non-performance by the vendee of his part of the contract. To entitle the bankrupt or his assignees to maintain trover, a distinct repudiation of the contract and a distinct demand of the goods was necessary. No evidence of such repudiation by the bankrupt was given, and therefore there

(a) Mood. & Malk. 196.

was no evidence of a conversion before the bankruptcy. So that whether the question be taken strictly upon the form of the pleadings or upon the facts, the defendant is in either case entitled to the nonsuit. *Smith, assignee &c. v. Woodward (a)*, may be relied on *contrà*; but that was the case of a *deposit* merely by the bankrupt, and not a case of *contract*, as here. There the goods were delivered to be *returned* whenever the bankrupt wanted them back; here, they were delivered to be *paid for*. The repudiation of the contract is the basis of the action, and that took place *subsequently* to the bankruptcy, if at all.

Follett, S. G. and Crowder, contrà. The ground of the nonsuit was this,—that inasmuch as in both counts of the declaration the conversion was laid since the bankruptcy, *therefore* the evidence was not admissible. The *facts* which have been referred to cannot be considered, because the plaintiffs' case was not closed at the time when the nonsuit took place. The action was brought on the ground of a fraud. The plaintiffs wish that question to go to the jury. With reference to the 92d section, the question is, whether the right of action arising out of the *state of facts*, is *altered by the bankruptcy*. If upon the state of facts, apart from the fact of the bankruptcy, the bankrupt might have sustained an action, then the case is within the 92d section, otherwise not. The question is not whether upon the *form of the record* the bankrupt could have recovered, for in no case could the *bankrupt* recover consistently with the *form of the record* in an action by assignees. According to the principle contended for by the defendant, an action brought by assignees to recover the price of goods sold by the bankrupt, upon a credit unexpired at the time of the bankruptcy, would not be within the section; yet it cannot admit of a doubt, that in such a case the depositions taken before the commissioners would be evidence. The

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(a) 4 Carr. & Payne, 511.

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object of the legislature in enacting the 92d section was, that assignees should not be vexatiously put to prove all the steps of the bankruptcy, where the bankruptcy forms no part of the *ground of action*; but that where the bankruptcy does form part of the ground of action, they should be liable to be called upon to prove the bankruptcy by direct evidence. This appears clearly from the act itself; but the principle which is now contended for by the plaintiffs, is expressly supported by the authority of *Patteson, J.* in *Smith v. Woodward* (a), and of the Court of Exchequer in *Fox v. Mahoney* (b). The latter case is, to the very letter, in point. It was there decided that the depositions are conclusive evidence under the 92d section, where the bankrupt might have sued, if no bankruptcy had intervened, though the *conversion*, which gave the right of action, took place *after* the act of bankruptcy. In the report of that case, the form of the declaration is not given, but there can be no doubt, upon looking at the whole report, that the conversion was laid *after* the bankruptcy. [Lord Denman, C. J. In the case of *Jones v. Fort* (c), upon which I acted at the trial, the words of the clause appear to have been construed by a strict reference to the cause of action as stated *on the record*. In the other cases, it does not appear what was the form of the record. From the plaintiffs' opening in this case, I was satisfied that there was no case of fraud, but that perhaps is not to the point now. One objection which occurs to me, to construing the words of the section by a reference to the state of facts, arises out of the difficulty in deciding before the case is completed, whether it is one in which the bankrupt might, but for the bankruptcy, have maintained the action. Must the judge decide this question upon the opening of the plaintiff's case, or after his case has been completed? or must the question be distinctly left to the jury?]

Cur. adv. vult.

(a) *Supra*, 713.

(c) *Moody & Malk.* 196.

(b) 2 *Compt. & Jerv.* 325.

In this term the judgment of the Court was delivered by Lord *Denman*, C. J., as follows:—

This was an action of trover to recover the value of certain quantities of bacon. The conversion was laid after the bankruptcy. Notice had been given of disputing the petitioning creditor's debt and act of bankruptcy; to prove which the depositions before the commissioners were tendered (*a*). I rejected this mode of proof, and the plaintiffs were nonsuited. Upon a motion to set aside this nonsuit, the only question was, whether, under the following circumstances, such rejection was proper.

The case for the plaintiffs was that the defendant,—assumed to be a creditor of the bankrupt, and knowing him to be in insolvent circumstances,—had fraudulently contracted for the goods, and obtained them upon the express terms of paying for them in cash, but with the intention of setting off the price against his own demand. And it was urged that this being a fraud on the bankrupt, and no contract, he might, but for his bankruptcy, have maintained an action to recover them back (*b*). On the part of the defendant it was alleged, that as the only conversions in the declaration were laid to have taken place *after* the bankruptcy, this upon *the face of the record* appeared not to be an action which the bankrupt could have maintained.

It is unnecessary to determine whether the plaintiffs would ultimately have made out a case entitling them to judgment against the defendant; for it is enough to say that they had a right to present it to the consideration of the jury. The question therefore turns upon the construction of the 92d section of the 6 Geo. 4, c. 16, and as this is a point of very general application, and the authorities

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(*a*) If the *notice* had had any operation, it would have been under the 90th section, under which the depositions would have been inadmissible in evidence.

(*b*) Viz.—an action of detinue, or of replevin in the detinet, *for the goods*, or an action of trover, *for the value*.

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appeared to conflict, we thought it right to look carefully into them before we pronounced our judgment.

The words of the section, after stating the circumstances under which it is to apply at all, are these:—"The depositions, &c. shall be conclusive evidence of the matters therein respectively contained in all actions at law or suits in equity, brought by the assignees *for any debt or demand for which the bankrupt might have sustained any action or suit.*"

It would perhaps have rendered the intention of the legislature more obvious, if, immediately after the word "bankrupt," the words—*if no bankruptcy had intervened*—had been inserted.

Two modes of construing the latter words of the section were suggested: the first, by a strict reference to the cause of action *as stated on the record*, which appears to have been the principle applied by Lord Tenterden in *Jones, assignee of Wild, v. Fort* (a)—a case recognized by him in *Gibson v. Oldfield* (b); and the latter, by a reference to the facts of the case, as contended for on the part of the assignees, which appears to have been the principle acted upon in *Smith, assignee of Parker, v. Woodward* (c), and *For, assignee of Suwercropp, v. Mahony* (d).

The nonsuit in the present case proceeded upon the adoption of the former mode; and this has apparently the advantage of great simplicity in its application. Taking the record to state all those circumstances which are necessary conditions to the maintenance of the action, it would seem very desirable to be able to determine the admissibility of a particular mode of proof by reference to so unambiguous and fixed a criterion, especially with regard to facts usually proved at the commencement of the trial, and before the general facts of the case have been gone into.

(a) Mood. & Malk. 196; *suprà*,
 714.
 (b) 4 Carr. & Payne, 313.
 (c) 4 Carr. & Payne, 541.
 (d) 2 Crompt. & Jerv. 325, and
 2 Tyrwh. 285.

But upon consideration we are of opinion that there is a fallacy in the application of this test; for, although the record must be taken to contain a statement of all circumstances formally necessary for the maintenance of the issue *by the plaintiffs*, the question is not whether the same issue in form could have been sustained, merely substituting the bankrupt's name as plaintiff for that of his assignee; but whether the bankrupt, if no bankruptcy had occurred, could have maintained any action or suit for the recovery of the same debt or demand. A reference to the record cannot answer this latter question: a conversion, for example, must be alleged in trover, either before or after the bankruptcy, in order to found the action by the assignees, but how can a statement of the latter only *in such action* be taken as proof that the former also might not have been truly stated, if, *the bankrupt* himself being plaintiff, it had become necessary?

Further, we are of opinion that it is by adopting the latter rather than the former rule, that we best effectuate the intention of the statute. The section in question (the 92d) must be looked at in connection with the 90th and 91st, 93d and 94th; and taking them all together, it is obvious that the legislature intended on the one hand to facilitate, and on the other to indemnify against, the recovery by the assignees of such debts or demands as were due to the bankrupt,—to the recovery of which their title as assignees was merely a formal step against every one but himself,—and in the recovery of which therefore the bankruptcy was an immaterial circumstance. In all such cases, if neither the bankrupt nor the debtor have given any notice of disputing their title, the assignees are relieved from producing any proof in support of it, and if such notice be given by the debtor only, are furnished with a simple and conclusive proof in the depositions taken before the commissioners. As the debtor is indemnified against the bankrupt for any payment made by such debtor, or recovery had against him

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fourth part; in consideration of 150*l.* and interest, paid to *Rowlands* by *Worsley*, and 200*l.* advanced by him to *Carter*,—the *fee* was released to *Worsley* upon trust to sell, to secure to him the repayment of 350*l.* and interest; and the term was assigned to *Bartley*, in trust also to secure the repayment of the 350*l.*, and subject thereto in trust to attend the inheritance. The release was engrossed upon four skins. The first skin had an ad valorem stamp of 2*l.*, and also the common deed stamp of 1*l.* 15*s.*; the three other skins (as “followers”) had stamps of 1*l.* each. Total amount of stamps 6*l.* 15*s.* It was objected by *Crompton*, on the part of the defendant, that the stamps were insufficient. He contended, in the first place, that this was an *original* mortgage for 350*l.*, as the *fee* had not been previously conveyed to secure that sum, and that there should therefore have been an ad valorem stamp of 4*l.*, and three 1*l.* stamps on the followers, which would make the amount of duty 7*l.*, and not 6*l.* 15*s.*:—or, secondly, that the first skin of the release required an ad valorem duty on 200*l.*, which is 2*l.*, and in addition the duty on transfers of mortgages, which is 1*l.* 15*s.*, and that the three followers required a stamp of 1*l.* 5*s.* each, so that the amount of duty should have been 7*l.* 10*s.* The learned judge directed a verdict to be found for the plaintiff, and gave the defendant leave to move to enter a nonsuit. In Easter term, *Crompton* obtained a rule nisi accordingly, against which

Cresswell, Sir *W. Follett*, and *Martin*, shewed cause, and

Crompton was heard in support of the rule (*a*).

Cur. adv. vult.

LORD DENMAN, C. J., in the course of this term, delivered the judgment of the Court, as follows:—In this

(*a*) As the arguments proceeded entirely on the construction of the statutes, which are commented upon in the judgment of the Court, it has been considered unnecessary to detail them.

case, a mortgage term of 1000 years, for securing 150*l.*, had been created in 1820. In January, 1823, (after the passing of 3 *Geo.* 4, c. 117,) the mortgagor and mortgagee joined in deeds of lease and release, by which the term was assigned to one of the lessors of the plaintiff, for securing the original 150*l.* and 200*l.* then advanced, and the fee-simple in the premises was conveyed to a trustee to secure the whole amount of 350*l.* The stamp on the first skin was 1*l.* 15*s.*, together with an ad valorem stamp of 2*l.*, and three stamps of 1*l.* on three following skins. The question was, whether these stamps are sufficient; and we think that they are. The deeds operate doubly, viz. by transfer of the original mortgage, and by conveyance of the fee as a further security.

As regards the transfer: the statute 55 *Geo.* 3, c. 184, schedule, part 1, title "Mortgage," treats a transfer, where a further sum of money is added, as an original mortgage; and imposes a transfer duty of 1*l.* 15*s.* only, "provided no further sum of money be added to the principal money already secured." Here, a further sum was added. The stamps, therefore, would have been under that act, a 4*l.* ad valorem stamp, and three progressive stamps of 1*l.* each,—thus exceeding the stamps actually imposed by 5*s.*

But the statute 3 *Geo.* 4, c. 117, s. 1 (*a*), repeals the 55 *Geo.* 3, c. 184, so far as regards the duties on transfers of

(*a*) Sect. 1 repeals the duties mentioned in 55 *Geo.* 3, c. 184, and 56 *Geo.* 3, c. 56, on assignments, &c. of mortgage.

Sect. 2. "That in lieu and instead of the duties by this act repealed, there shall be granted, raised, levied, collected and paid, in (Great Britain and*) Ireland, unto His Majesty, His heirs and successors, the several sums of money and duties following; that is to say, upon any transfer, assignment, disposition, assignation,

or reconveyance of any mortgage or of any other security, in the said acts and the schedules thereto annexed in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, *provided no further sum of money or stock be added to the principal money or stock already secured*, there shall be paid in Great Britain a stamp duty of one pound fifteen shillings, and in Ireland a stamp duty of one pound British currency for the first skin

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mortgages; and enacts, by section 2, that in case of a transfer, "provided no further sum of money be added to the principal already secured," there shall be paid 1*l.* 15*s.*, and a progressive stamp duty of 1*l.* 5*s.*; "and if any further sum of money shall be added to the principal money already secured, the ad valorem duty on mortgages, payable under the said recited acts respectively, shall be charged only in respect of such further money." It is observable that by this act the transfer duty of 1*l.* 15*s.* is imposed with the same proviso as was contained in the 55 *Geo.* 3; and we think that the effect is the same, viz. that the transfer duty is imposed in those cases only where no further sum of money is added. Here, a further sum is added, and therefore the *transfer* duty is out of the question. The other part of the section requires an ad valorem duty on the sum added; and we think that the effect of that part of the clause is to make this transfer, as regards stamp duties,

or piece of vellum or parchment, or sheet or piece of paper upon which such transfer, assignment, disposition, assignation or re-conveyance shall be ingrossed, written or printed;" (then follows a provision for further stamps where more than 2160 words;) "and if any further sum of money or stock shall be added to the principal money or stock already secured, the ad valorem duty on mortgages payable under the said recited acts respectively shall be charged only in respect of such further money or stock."

Sect. 3. "That where any deed or other instrument already made or hereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any of the government or parliamentary stocks or funds, or in the stocks and funds of the Governor and Com-

pany of the Bank of England, or of the Bank of Ireland, already or previously secured by any bond on which the ad valorem duty on bonds charged by 55 *Geo.* 3, c. 184, and 56 *Geo.* 3, c. 50, and the schedules thereto respectively annexed, shall have been paid, such deed or other instrument shall be, and be deemed to be and to have been, exempt from the several ad valorem duties charged by the said acts and the said schedules respectively on mortgages, and shall be charged and chargeable only with the ordinary duty payable on deeds in general in Great Britain and Ireland respectively; but if any further sum of money or stock shall be added to the principal money or stock already secured, the said ad valorem duties respectively shall be charged in respect of such further sum of money or stock."

an original mortgage for securing 200*l.*, and that the ad valorem stamp duty of 2*l.* is charged upon it by the 55 Geo. 3. It follows that the progressive duty is three sums of 1*l.* each. Those stamps are actually on the deeds in question.

But it is said that this is an *original* mortgage for 350*l.* by reason of the conveyance of the *fee*. The 3 Geo. 4, c. 117, s. 3, does not apply to these deeds; for it is confined to cases where the original instrument on which the ad valorem duty was paid was a *bond*. Here, it was an *indenture*. This part of the question therefore turns on the exemption clause in 55 Geo. 3. That clause exempts from ad valorem duty (but not from any other,) any deed made as additional or further security for any sum of money already secured by a deed which shall have paid the ad valorem duty, in case such further security shall be made by the same person who made the original security; but if any further sum be added, the ad valorem duty shall be charged in respect of such further sum. Here, the person conveying the *fee* is the same person who created the term, and a *further sum* is added. Therefore if the deed had been simply a conveyance of the *fee*, and had not contained a transfer of the term, the duty would have been 2*l.* ad valorem on account of the additional 200*l.*, and three progressive duties of 1*l.* each. Whether a common deed stamp also was necessary under either of the acts, it is not material to inquire, because the 1*l.* 15*s.* stamp, though it may have been *erroneously* put on these deeds, was at all events *sufficient*. But as the deeds in question do contain a transfer of the original mortgage, it is plain that before the passing 3 Geo. 4, c. 117, the exemption clause in 55 Geo. 3, c. 184, would not have applied, and on the whole this must have been treated as a new and original mortgage, liable to the ad valorem duty of 4*l.* The act of 3 Geo. 4 has, however, repealed that part of the 55 Geo. 3, and substituted the same ad valorem duty of 2*l.* on the transfer, in respect of the *additional sum*, as the exemption clause had already charged on the *new* security in respect of the *additional sum*; and as the ad

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valorem duty depends on the *sum* secured, and not on the value or number of the *securities*, and is only to be paid once, it follows that the case is the same in effect as if the ad valorem duty of 2*l.* had been charged on the transfer, and afterwards the fee had been conveyed as a further security for the whole sum of 350*l.*, in which case a common deed stamp only would have been required.

For these reasons we are of opinion that these stamps are sufficient, and that the rule for a nonsuit must be discharged.

Rule discharged accordingly.

DOE, on the demise of FREDERICK LUMLEY, Esq.
v. The Earl of SCARBOROUGH.

Devise to
*A., B., C., and
D.* suc-
cessively, in strict
settlement.

Proviso, that

if the title of Earl of *S.* shall come to *A., B., C. and D.* (devisees for life), or their sons, within the period of the lives of the said *A., B., C. or D.*, or within the term of twenty-one years after the decease of the survivor of them, then and in such case as and when the title of the said Earl of *S.* shall come and fall into possession to him or them, the estate which he or they then shall be entitled unto in all and every the manors hereinbefore devised, shall cease and determine, and become void; and the same manors shall immediately thereupon go to the person or persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid, would take the same by virtue of the devise, in case he or they to whom the title shall come and fall, in possession as aforesaid, was or were actually dead without issue:—

Held, that although the words from “time to time” are not inserted, yet the proviso attached to each of the estates created by the will, as they should successively vest in possession.

The effect of this proviso, in the event of the title descending on a tenant for life, is not to let in the *son* of such tenant, but to carry the estate over to the next branch of the family.

The will in which the above proviso was inserted, contained a devise to *A.* for life; remainder to trustees during his life, to preserve contingent remainders; remainder to *F.*, the son of *A.*, in tail; remainders over. *A.* and *F.* suffered a recovery. The title of Earl of *S.* descends upon *A.*:—Held, that the uses to arise under the proviso are *not* barred by this recovery.

Semble, that the remainders over, subsequent to the estate tail limited to *F.*, are barred.

Where the truth appears by recitals in a deed, professing to convey a possibility, the party conveying is not barred by estoppel, although he has received the purchase money.

The special verdict was in substance as follows :

Sir *George Savile*, of Rufford, in the county of Nottingham, Baronet, was seised of the manors and hereditaments mentioned in the declaration at the time of making his will and until his decease. By his will, dated on the 18th of August, 1783, he devised the premises to two trustees in fee, to the following uses :—

To the use of *J. H.*, *J. M.* and *G. M.* for the term of twenty-one years, upon certain trusts ; remainder

To the use of *Dr. N. O.* and *Sir C. O.* for 500 years, upon other trusts ; remainder

To the use of his nephew the Hon. *Richard Lumley*, the second son of his sister *Barbara*, Countess of *Scarborough*, by the late Earl of *Scarborough*, and his assigns, for life, without impeachment of waste ; remainder

To the use of trustees, during his life, to preserve contingent remainders ; remainder

To the use of the first son of *R. L.* in tail male ; remainder

To the use of the second and every other son of *R. L.* successively in tail male ; remainder

To the use of his nephew, the Hon. *John Lumley* (the defendant, now Earl of *Scarborough*), the third son of the said late Earl and Countess, and his assigns, for life, without impeachment of waste ; remainder

To the use of trustees during his life, to preserve contingent remainders ; remainder

To the use of the first and every other son of the said *J. L.* (the defendant,) in tail male ; remainder

To the use of his nephew, the Hon. *Frederick Lumley*, (father of the lessor of the plaintiff,) fourth son of the said late Earl and Countess, and his assigns, for life, without impeachment of waste ; remainder

To the use of trustees during the life of *F. L.*, to preserve contingent remainders ; remainder

To the use of the first and every other son of *F. L.* in tail male.

Similar remainders to *Savile-Henry Lumley* and *William*

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Lumley, two other sons of the late Earl and Countess, life, and to their sons in tail male. After other limitation to *John Foljambe* and *Francis Foljambe* in tail male, the ultimate fee was limited to the testator's right heirs.

The will also contained the following clauses:—"It is my will and meaning that all and every person and persons who, by virtue of this my will, shall become entitled to the possession or to the rents and profits of the mansion-house and estate in Nottinghamshire, hereinbefore devised, shall and do, within the space of two years next after he or they shall severally become entitled to the possession or to the rents and profits thereof, take upon himself and themselves, and use in all deeds and writings whereto or whereunto he or they shall be party or parties, and upon all other occasions, the surname of '*Savile*' after his or their own surname and surnames, and jointly with any dignity or title that may be vested in him or them. And also shall and do quarter the arms of *Savile* with his or their own family arms. And shall and do, within the space of two years, apply for and endeavour to obtain an act of parliament or a proper licence from the crown, or take such other means as may be requisite or proper, to enable and authorize him or them respectively to take, use and bear the said surname and arms of *Savile*; and in case any such person or persons shall refuse or neglect to take, &c. it is my express will and meaning, that from and after the expiration of the said space of two years, the gift, devise and limitation of all and every the manors and hereditaments hereinbefore devised or limited to him or them so neglecting or refusing, shall, in case such neglect or refusal shall happen within the period of the life or lives of any of the younger sons of the said late earl, who shall be living at my decease, or of twenty-one years after the decease of the survivor of such younger sons so living at my decease, cease, determine and become utterly void, and all the same manors and hereditaments shall in such case immediately thereupon go to the person next in remainder in

this my will, in the same manner as if such person or persons so neglecting or refusing, being tenant or tenants *for life*, was or *were dead*, or being tenant or tenants *in tail*, was or were actually *dead without issue male*, and without prejudice to any jointure &c., limited &c., before such cesser or determination. Provided also, and it is my further will and meaning, that if the title of Earl of S. shall descend or come to any of them the said *Richard Lumley, J. L., F. L., S. H. L., and W. L.*, or to any of their sons within the period of the lives of any of such of the younger sons of the said late earl as shall be living at my decease, or within twenty-one years after the decease of the survivor of such sons so living at my decease, then and in such case, and as and when the title of the said Earl of S. shall come and fall in possession to him or them, the estate which he or they then shall be entitled unto in all and every the manors and hereditaments hereinbefore devised under or by virtue of this my will, shall then cease and determine, and become void, and the same manors and hereditaments shall immediately thereupon go to the person and persons who under the limitations aforesaid shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the said title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said Earl of S. shall come and fall in possession as aforesaid, was or were *actually dead without issue*, such person and persons so in remainder performing and complying with the condition or proviso hereinbefore contained for taking and using the surname and quartering the arms of *Savile* as aforesaid: Provided nevertheless, that any such cesser or determination of the estate of the person or persons to whom the said title of the Earl of S. shall come, shall not in anywise prejudice or affect any jointure &c., limited &c., before the cesser. The will contained a power for *Richard Lumley*, when in possession, to jointure and

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to charge the estate with a sum not exceeding 10,000*l.* for portions for younger children.

There was also a powe. to *John Lumley, F. L., S. H. L., W. L., J. F., and F. F.*, when in possession, to jointure and lease.

In January, 1784, *Sir George Savile* died.

Richard Lumley, John Lumley (the defendant), *Frederick Lumley-Savile, Henry Lumley, and William Lumley*, survived him.

Richard Lumley entered into the possession or receipt of the rents and profits of the premises, and, pursuant to the direction in the will, took upon himself and used the name of *Richard Lumley-Savile*, and quartered the arms of *Savile* with his own.

In September, 1807, *George-Augusta, Earl of Scarborough*, died without issue male, and the title of Earl of *S.* descended to *Richard Lumley-Savile*; whereupon *John Lumley* (the defendant) entered into possession or receipt of the rents and profits of the premises, and took and used the name of *John Lumley-Savile*, and quartered the arms of *Savile* with his family arms. *John Lumley-Savile*, commonly called Viscount *Lumley*, is the eldest son of the defendant.

27th and 28th November, 1809. By indentures of lease and release, the premises were conveyed by the defendant and *John Lumley-Savile* (who was then twenty-one years of age) unto *G. T.* during the joint lives of *G. T.* and the defendant: To the use of *J. G.* during the joint lives of *J. G.* and *G. T.*, in order that *J. G.* might become tenant of the freehold, that a common recovery might be suffered; and it was declared, by the release, that the recovery should enure to such uses and upon such trusts as the defendant and *John Lumley-Savile* should appoint.

6th November, 1812. A common recovery was suffered of the premises, in which *J. G.* was tenant, and *John Lumley-Savile*, the younger, was vouched.

27 and 28 May, 1812. By indentures of lease and release the premises were, in pursuance of the power contained in the release of 28th November, 1809, duly appointed by the

defendant and the said *John Lumley-Savile*, to the defendant for life, with divers remainders over.

1 and 2 July, 1817. By indentures of lease and release, the release being between the said *Frederick Lumley* (therein described as *F. L.* the elder) of the first part, *Frederick Lumley* the younger (the lessor of the plaintiff), therein described as eldest son and heir apparent of the said *F. L.* the elder, of the second part, the defendant of the third part, and *B. C.* and *P. E. O.* of the fourth part;—after reciting the will and stating the death of Sir *George Savile*, and reciting the indentures of 27th and 28th November, 1809, and 27th and 28th May, 1812; and also reciting (but by mistake) that no recovery had been suffered of the hereditaments in the county of Durham; and reciting that *F. L.* the elder and *F. L.* the younger had contracted with the defendant for the absolute sale to the defendant of all the right and interest whatsoever, whether vested or contingent, legal or equitable, or in possession, remainder, or reversion, of them, *F. L.* the elder and *F. L.* the younger, and each of them, of, in, to, from, or out of the freehold, copyhold, and leasehold estates respectively devised and bequeathed in and by the said will, and of such leaseholds as had been or might be renewed, at or for the price or consideration of one annuity or yearly sum of 1000*l.*, to be paid to *F. L.* the elder during his life, and after his death to *F. L.* the younger, during the joint lives of *F. L.* the younger and the defendant, the same to be secured by the covenant of the defendant in the manner thereafter mentioned: It was witnessed, that in pursuance of the said agreement, *F. L.* the elder and *F. L.* the younger (then being of the age of twenty-nine years) did, at the request of the defendant, grant and release the premises unto, and to the use of, the said *B. C.* and *P. E. O.*, upon certain trusts. The release also contained a covenant by the defendant to pay unto *F. L.* the elder, during his life, the sum of 1000*l.* per annum, and after his decease to pay to the lessor of the plaintiff, during the joint lives of the

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defendant and the lessor of the plaintiff, the sum of 1000*l.* per annum. The said annuity of 1000*l.* was duly paid by the defendant to *F. L.* the elder during his life-time.

September, 1831. *F. L.* the elder died; and the lessor of the plaintiff was and is his only son.

Since the death of *F. L.* the elder, the annuity of 1000*l.*, up to the 1st November, 1832, has been paid by the defendant to the lessor of the plaintiff.

17th June, 1832. *Richard*, Earl of *Scarborough*, (who, upon his accession to the earldom, had taken the name of *Lumley-Saunderson*,) died without issue male, whereupon the title of Earl of *S.* descended upon the defendant.

Since the death of Earl *Richard*, and before the demise laid in the declaration in this action, possession of the premises was demanded by the lessor of the plaintiff, of the defendant, and such possession was refused.

This case was argued in Michaelmas term, 1834, by

*Campbell*, A. G. (with whom were *Loftus*, *Wigram*, and *W. H. Watson*,) for the plaintiff, as follows:

First point:  
*Possibility* not  
 assignable.

Second point:  
 No estoppel.

Third point:  
 Recovery in-  
 effective.

In order to shew the plaintiff's right to recover, three points must be established. *First*, that a *possibility* (a) not being assignable at law, nothing passed to the trustees by the lease and release of 1817; *secondly*, that the release of 1817, having disclosed the whole truth of the case, does not (b) estop the lessor of the plaintiff; and *thirdly*, that the recovery did not bar the use which was to arise under the proviso for shifting the uses on the descent of the earldom.

As the two first points are admitted by the defendant (c), the only question between the parties relates to the effect of the *recovery*.

As respects this point, the case is extremely simple. It

(a) As to the assignment of a possibility, and the meaning of the term "possibility coupled with an interest," see *ante*, i. 170.

(b) See Co. Litt. 352 a, n. 1; *ibid.* 352 b; *Hermitage v. Tom-*

*kins*, 1 Lord Raym. 729; *Poole v. Haskey*, Bridgm. 369; *Right v. Bucknell*, 2 Barn. & Adol. 278.

(c) On the opening of the argument, *Preston* stated that he admitted these points.

stands thus—Devise to the defendant for life: Remainder to trustees to preserve contingent remainders during his life: Remainder to the defendant's son (Viscount *Lumley*) in tail; with a proviso that if a given event (the descent of the earldom) happens during the life of the defendant, or within twenty-one years afterwards, the lands shall remain to the use of the lessor of the plaintiff. The defendant conveys to *A. B.* during the joint lives of himself and *A. B.*, to make him tenant to the præcipe, and the defendant's son (Viscount *Lumley*) is vouched in a recovery. Then the event happens during the life of the defendant, and the question is, whether the use to arise under the proviso is defeated by the recovery.

In discussing this question it will be most convenient to consider, first, whether the proviso would have been defeated, if it had been restricted to the case of the happening of the event during the life of the defendant; if not, then, secondly, whether the circumstance of its not being so restricted makes any difference.

I. The plaintiff's first proposition is, that if the proviso for shifting the uses had been restricted to the case of the event happening during the life of the defendant, it would not have been defeated by the recovery.

Upon general principles, the recovery ought not to defeat the use to arise under such a proviso. Recoveries are regarded in the books in two points of view. In the very old cases they are considered and spoken of as real actions; in all modern authorities they are treated as a common assurance. If recoveries were to be regarded as real actions, it might be difficult to contend that the proviso would not be defeated; because, according to that doctrine, the estate gained by the recovery would be an estate by title paramount the estate-tail,—paramount the estates limited by the settlement,—and, consequently, paramount the use which arises under the proviso in question. But it is not necessary to combat the difficulties which this view of the subject might present, because it is perfectly clear that recove-

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 Third point.

First proposition:  
 Whether proviso defeated by contingency happening in life-time of the defendant.  
 Effect of recovery on principle.

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ries now are, and for a long period have been, regarded by the courts and by the legislature, as a mode of assurance. In *Benson v. Hodson* (a) and *Martin v. Strachan* (b), it is particularly said that they are to be considered as "conveyances." In the latter case, the chief justice, who delivered the judgment of the court, says, "I shall consider common recoveries only as *common assurances*, and not at all as real actions, being of opinion that all the confusion which has arisen concerning recoveries, has been occasioned by resembling a common recovery to another recovery, by considering it as a real transaction." Taking recoveries then to be a mode of assurance, it ought to follow on principle, that the interest passed by the recovery of tenant in tail is an interest derived out of his estate-tail. And that this is so is clearly established. Thus in *Capel's case* (c), upon the principle that "the recoveror is *in* of the estate which he hath gained *under the tenant in tail*,"—it was held that the estate gained by the recovery of tenant in tail, is not subject to a rent-charge granted by the remainder-man (d). So in *Benson v. Hodson* (e), the decision was made on the principle that "the recoveror comes in in continuance of that estate that is not subject to the rent, but is above all those charges." Again, in Lord *Derwentwater's case* (f), where "a papist, being a tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs," it was held that this was not a *purchase* within 11 & 12 Will. 3, but a *modification* of the family estate, on the principle that "he took no new estate by the recovery by way of purchase, but was in of his old estate." And so in *Martin v. Strachan* (g), and *Roe v. Baldwre* (h), upon the

(a) 1 Mod. 109.

(b) 5 T. R. 107, note.

(c) 1 Co. Rep. 62 a, b; S. C. Poph. 5. per nom. *Hunt v. Gateley*.

(d) A fortiori if the recovery were treated as a judgment obtained in an *adverse* action, in respect of a title paramount that of the donor in tail, and therefore paramount

that of the remainder-man.

(e) 1 Mod. 109.

(f) 9 Mod. 172; S. C. *Figott on Recoveries*, 119.

(g) *Willes*, 444; S. C. 1 *Wils.* 66; S. C. in K. B. 2 *Strm.* 1179, and 5 T. R. 107, n.; S. C. in *Dom. Proc.* 6 *Brown. P. C.* 2d ed. 319.

(h) 5 T. R. 104. On the same



principle that "upon a recovery, the new use arises wholly out of the estate-tail," it was held that the estate gained by a recovery, will descend as the estate-tail would have done, i. e. will go to the heir *ex parte paternâ* or *maternâ*, according as the estate-tail was derived from the paternal or maternal ancestor. From these cases, therefore, it is clear that the recoveror is in *under* the estate-tail, and that the fee simple gained by the recovery is an estate derived *out of* the estate-tail. The rule is accordingly so stated in the note to 1 *Wms. Saunders*, 42 a. It is not intended to attempt any explanation of the difficulty which might be suggested by the question—How can a larger estate be derived out of a less? The proper answer to such a question is, what *Willes*, C. J. said in *Martin v. Strachan*,—that the reason of the operation of the recovery is a thing in itself *inexplicable*. It is sufficient that the *principle* is clear, and that in the cases above cited it was made a ground of legal inference and decision. From the principle, it necessarily follows that the derivative estate recovered must be subject to whatever the entire estate-tail out of which it is derived was itself subject to; and applying this inference to the present case, it is clear that the fee gained by the recovery is subject to the use to arise under the proviso (a). The effect of limiting

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principle, in *Garth v. Cotton*, 3 Atk. 751, it was held, that for waste done before the recovery, the quondam tenant in tail might bring waste after the recovery.

(a) *Quere*, whether the principle on which the argument proceeds would not go the whole length of proving that the recovery of the tenant in tail could not, *under any circumstances*, bar the proviso? It seems difficult to understand, *upon what principle* the interposition of the particular estate should make any difference,—or why "the fee gained by the recovery" should not be equally "subject to the use to arise under the proviso," whether

the recovery were suffered before or after the vesting of the estate-tail *in possession*? There appears to be less difficulty in assenting to the position that the recovery did *not* bar the proviso, than in discovering the *principle* on which the proviso *would* have been barred, if the recovery had been suffered after the determination of the life-estate. The ordinary provisos limiting over the estate on neglect to take name and arms, or on the accession of another estate, &c. can be valid only by way of executory devise, or springing use, (see Hargr. & Butl. Co. Litt. 327 a, n. 2, by Mr. Butler;) but executory devises and springing uses

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an estate to *A.* for life, remainder to *B.* in tail, with a proviso that if a given event happen during the particular

take effect out of the *fee* generally, without reference or relation to any particular limitation; and if it cannot be correctly affirmed of any executory devise or springing use that it is either *precedent* or *subsequent* (except in point of position in the instrument—a matter, for this purpose at least, wholly immaterial,) to any of the estates created by the instrument, (it being, in truth, a liability to which the *fee*, moulded into those estates, was on their creation subjected,) the distinction, that the power or proviso was in the one class of cases *precedent* to the estate-tail, (and therefore not barred,) and in the other *subsequent* to the estate-tail, (and therefore barred,) will appear hardly satisfactory; still less so, the proposition, that the power or proviso is, during the continuance of the prior estate for life, *precedent*,—and, after its determination, *subsequent*, to the estate-tail.

The effect of a common recovery suffered by tenant in tail seems, in every case, to be that of simply substituting a fee-simple for the *estate-tail*. The result of this construction of the operation of a recovery would be, on the one hand, to exclude all estates in remainder or reversion expectant upon the estate-tail, and, on the other, to leave untouched all prior estates on which the estate-tail was itself expectant, as well as all executory limitations suspended over the *fee*; so that the recoveror, instead of having a fee-tail defeasible (as being a constituent part of the *fee* so defeasible,) by the executory limitation, would have the *fee* itself so

defeasible. This, the only construction perhaps by which the subject can be rescued from the difficulties which surround it, does not appear to be open to objection as tending to establish a perpetuity, for it would be necessary to the validity of the executory limitation that it should be confined, in its creation, within the bounds of the rule against perpetuities.

As a consequence of the doctrine of the destructibility of executory limitations, treated as *lying behind* an estate-tail, (or, in the language of the plaintiff's argument, as "springing from a point anterior to the commencement of the estate-tail,") it is laid down that "a shifting use may be limited to take effect at any period, however remote, where the estate is regularly limited in tail," (*Sugd. Pow.* 4th ed. 149, 5th ed. 150,) and, accordingly, powers of sale and exchange, extending indefinitely over the whole duration of a strict settlement, have been supported. *Biddle v. Perkins*, 4 Sim. 135; *Powes v. Capron*, ib. 138, n.; *Waring v. Coventry*, 1 Mylne & K. 249; *Boyce v. Hanning*, 2 Crompt. & Jerv. 334. Thus one departure from principle induces more.

It has been suggested that if the law upon the subject were in a sound state, the only inquiry where a limitation is alleged to be barred by the recovery of tenant in tail would be, whether it was a particular estate standing *before*, or a remainder or reversion to take effect *after*, the estate-tail; while the only inquiry as to a limitation not answering to either of these

estate, the lands shall go over to *C.*, obviously is and must be—to make the limitation to *B.* wholly subject, in the given event, to the limitation over to *C.*; and à fortiori, an estate carved or derived out of the interest so limited to *B.*, must also necessarily be subject to the same limitation over.

Thus far the plaintiff has rested his case on general principle only.

2. There is abundant *authority* illustrating and supporting the proposition, that the estate gained by the recovery is subject to the estates to which the entire estate-tail was subject, and one express decision, to the effect that the estate acquired by the recovery in the present case, is subject to the use arising under the proviso. Thus charges created by the donor before the creation of the entail, are not barrable by recovery. So in *White v. West* (a), where a gift was made by *A.* to *B.* in tail, rendering rent, it was held that a recovery by *B.* did not bar the rent; a decision which seems to turn on the principle that the reservation is a charge on the estate-tail itself. So in *Co. Litt.* 203 b, note 1 (b), it is said, “Supposing *A.* to be tenant for life, with the usual powers of leasing, jointuring, and charging,—remainder to trustees to preserve contingent remainders,—remainder to *A.*’s first and other sons in tail male,—remainder to his daughters as tenants in common in tail,—with cross-remainders in tail between them, if more than one; with remainders over:—*A.* and his daughters may suffer a common recovery, and it will be good against *A.* and his daughters, and their issues in tail, and the remainders over. But the estates-tail

descriptions, would be, whether it was too remote or not,—that thus a simple and certain rule would be substituted for the acknowledged vagueness of the received doctrine,—that the true mode of looking at the executory limitation seems to be, to consider it as something distinct from, and suspended over, the regular modifications of the fee, and governed by a law peculiar to itself. But the broad principle here

suggested could only be established, (if indeed it be not too late to recur to *principle*,) by a decision of the highest tribunal. This view of the question would go not merely to support the decision in the principal case, but to reduce still further the dominion of the tenant in tail over *executory* limitations, and, of course, over analogous equitable dispositions.

(a) *Cro. Eliz.* 793.

(b) Or note (94) by Mr. Butler:

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Effect of recovery according to authorities.

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of the sons being prior to the estate of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent at the time of the recovery, affected by it." And so in *Eales v. Cann* (a), where an estate was limited to uses as follows, viz. to the husband for life, remainder to the wife for life, remainder to trustees for 500 years, remainder to the first and other sons in tail; the trusts of the term being first to raise portions for the younger children, (if any,) which failed; and secondly, if the wife should die without leaving any issue of the marriage living at her death, to pay J. S. 600*l.* The husband died. Then the wife and only son suffered a recovery. Afterwards the son died without issue, and then the mother died. It was held that the 600*l.* charge was not barred. In *Roper v. Halifax* (b), the like principle was applied under circumstances in effect exactly similar to the present case. The similarity of that case and the present, will be seen by comparing the limitations in the two cases together.

The case of *Roper v. Halifax* was in effect thus:

A. for life,—  
 Trustees to preserve,—  
 B. for life,—  
 Trustees to preserve,—  
 C. in tail.

Power to trustees during the lives of A. and B., or the life of the survivor to revoke and appoint new uses.

Question, whether a tenant to the præcipe being made by A. and recovery suffered by C., the power will be barred.

The present case is thus:

A. for life,—  
 Trustees to preserve,—  
 C. in tail.


Proviso that on a given event taking place, during the life of A., the old uses shall cease, and new ones take effect.

Question, whether a tenant to the præcipe being made by A. and recovery suffered by C., the proviso will be barred.

(a) 4 Sim. Rep. 65.

(b) 8 Taunt. 845. And see *S. C.* Sugd. Powers, 5th ed. Appen. No. 4.

As a *power* to alter the uses of a settlement, and a *proviso* for altering them upon a given event, differ only in the nature of the event upon which the new uses are to arise, a *power* to alter uses being a *proviso* that they shall be altered upon the power being exercised, the two cases are exactly similar. *Roper v. Halifax* was twice argued, and it was decided that the power was *not* barred.

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3. All the cases in which a recovery has been held to be a bar to a condition or shifting use, have been distinguished from the present case by a marked feature. In all of them the limitation over, (or springing use,) which was held to be barred, was not precedent in point of limitation to the estate-tail, (as is the case here,) but was subsequent to it. The use did not, as in the present case, spring from a point anterior to the commencement of the estate-tail, but only abridged or determined the estate-tail after it had commenced in interest (*a*). Thus, in 1 *Mod.* 111 (*b*), the two following cases are put by *Hale*:—"A man made a gift in tail, determinable upon his non-payment of 1000*l.*, the remainder over in tail to *B.*, with other remainders. Tenant in tail before the day of payment of 1000*l.* suffered a common recovery, and doth not pay the 1000*l.*; yet because he was tenant in tail when he had suffered the recovery, by that he had barred all." And again, "If tenant in tail be with a limitation—so long as such a tree shall stand—a common recovery will bar that limitation." In both which cases the estate tail is *precedent* to the limitation which is barred. So in *Page v. Hayward* (*c*), it was laid down, that if an estate were limited to *Mary*, and the heirs male of her body,

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 limitations.

(*a*) In the principal case, it is clear that the estate-tail had "commenced in interest;" that it was a *vested* estate in remainder; and consequently that by the operation of the proviso it was divested or defeated,—or, in other words, "abridged or determined after it had commenced *in interest*;" un-

less, by this expression, we are to understand, "commenced in *possession or actual enjoyment*," in which sense, however, the words do not appear to be employed.

(*b*) In *Benson v. Hodson*, cited *supra*, 732.

(*c*) 2 Salk. 570.

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by *Searle* to be begotten, provided that if she should marry any but a *Searle*, then the estate should remain and be to J. S. and his heirs, a common recovery suffered before marriage would bar the estate-tail and remainders, and her marriage with another would not avoid the recovery. Here again, the limitation over was *subsequent* to the estate-tail. In *Gulliver v. Ashby (a)*, an estate was devised according to certain limitations, under which A. S. became tenant in tail in possession, and two years afterwards suffered a recovery, and the will contained a proviso that every person to whom the estates should descend should take the name of *Wykes*, but without any devise over for non-performance. A. S. never took the name, and the question was, whether the estate went over. It was held that it did not,—on the ground either that there was no limitation over, or that if there were, it was barred by the recovery. But here also the gift over (if any) was clearly *subsequent*, in point of limitation, to the estate-tail. So also in *Driver d. Edgar v. Edgar (b)*, where the demise was to *Mary E.* in tail;—proviso, that if she should die, not leaving a child or children living at her decease, the estate should go over: *Mary E.* suffered a recovery, and it was held that she took an estate-tail, and that the recovery barred the limitation over. The gift over was clearly *subsequent*. In all these cases, therefore, there is a marked feature which distinguishes them from *Roper v. Hallifax* and the present case, in which the springing use takes effect not *subsequently* to the estate-tail, but arises from a point *anterior* to the commencement of the estate-tail. The principle on which *Page v. Hayward* and the like cases depend, has no application to the case of a springing use, which arises *antecedently* in point of limitation to the estate-tail, that is, a use which springs from a point anterior to the commencement of it. The ground on which a recovery bars a remainder expectant on an estate-tail is, as expressed by *Hale* in *Benson v. Hodson*, that the recoveror comes in *in continuance* of the estate-tail, so that

(a) 4 Burr. 1930.

(b) Cowper, 379.

the remainder never comes into possession. Now this continuance of the estate-tail may, obviously, well prevent any limitation or springing use from taking effect, which merely abridges or determines the estate-tail:—such as the conditional limitation in the case put by *Hale*, of a conveyance to *A.* and the heirs of his body, so long as a tree stands, and then over. The prolongation of the estate-tail, by the recovery, may, on the same principle, as it prevents its determination by the failure of issue, also prevent its determination under a conditional limitation annexed to it. But the mere *prolongation* of the interest of the tenant in tail can have no tendency to preclude the operation of a proviso which springs from a point *anterior* to the commencement of the estate-tail, and overreaches the entirety of it. In such a case the proviso does not *determine* the estate-tail, but *substitutes* a new use in the place of the entirety of it, in the same manner as if the limitation in tail had never been contained in the settlement. A distinction exactly to this effect is suggested in two notes of the late Mr. Serjeant *Hill*, which have been printed in *Sanders on Uses* (a). From the first note it appears that the serjeant at one time considered that *Page v. Hayward* went too far, and that even in such cases the recovery would not bar conditional limitations. He afterwards altered this opinion, and added a second note, which is as follows:—"N. B. Since the above was written, it seems clear, on further consideration, that where an estate is devised to one in fee-simple upon condition, and in case the condition be not performed, then to another; this, if within due bounds, will be good as an executory devise, and therefore not barrable by recovery, because no executory devise can be barred by recovery, (at least not unless the person to whom the executory devise is made is vouched in the recovery,) yet if in such case the first devise be not a fee-simple, but a fee-tail, then the devise over will operate not by way of executory devise, but as a contingent remainder, and consequently a recovery suffered by tenant in tail

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before the condition or contingency happens on which the remainder is to take effect, must extinguish it,—because a remainder cannot, though an executory devise may, and always does, subsist without a particular estate to support it. But where lands are devised (to *A.*) in tail on condition, and if the condition be broken then to *B.*, this, though called a *condition(a)*, is, by reason of the devise over, a *limitation* (an executory limitation), or, as it is frequently called, a *conditional limitation(b)*; and the devise over, being limited after a particular estate, (*viz.*) an estate-tail, (which is capable of supporting it as a contingent remainder,) it therefore operates as a contingent remainder; and therefore a recovery suffered (before breach of condition) by tenant in tail, must destroy the contingent remainder by destroying the particular estate which supported it, before the contingency happened, that is, before the remainder vested; for it is a clear rule that every *remainder* must vest during the particular estate, or eo instanti that it determines, or otherwise it can never vest at all.” From this note it appears, that, in the opinion of the learned serjeant, the only cases to which the principle of *Page v. Hayward(c)* is applicable, are cases where the limitation, by which the estate-tail may be affected, is *expectant on the estate-tail* in the same manner as a contingent remainder is expectant. The part of the note which suggests that the reason of the executory limitations being barred, is, that the particular estate which supports it is destroyed, is open to objection; because an *executory limitation* does not (according to the distinctions now made) require to be supported by a particular estate as a *contingent remainder* does. But the general bearing and intention of the note agrees with what is now insisted on, *viz.* that the principle on which *Page v. Hayward*

(a) Mr. *Fearne*, (*Cont. Rem. c. 2, s. 3.*) in his observations upon clauses for the cesser of the estate of a tenant in tail, would rather appear to have confounded condi-

tions, strictly such, with *executory limitations*, sometimes less accurately termed, *conditional limitations*.

(b) Co. Litt. 203, n. (94).

(c) 2 Salk. 570; *suprà*, 737.



and other similar cases depends, applies only to cases where the executory limitation is *subsequent* to or *expectant* on the estate-tail, not to a case where the executory limitation or springing use arises from a point *anterior* to the commencement of it. The note, taken with the decided cases, supports the position, that the ground on which a recovery operates as a bar to an executory limitation is,—analogy to its operation as a bar to remainders; according to which rule, the right of the plaintiff in this case, to recover, would be clear,—since such analogy holds only as to uses which are *subsequent* to and *expectant* on the estate-tail, not with respect to uses which are *antecedent* to it.

The result then of the plaintiff's argument is this. First, On general principles, the estate recovered being *derived* out of the estate-tail, ought to be subject to whatever the *entire* estate-tail was itself subject to, and consequently subject to a springing use which arises from a point anterior to the commencement of it. Secondly, *Roper v. Hallifax* has decided that it is so subject; and other authorities bear out that conclusion. Thirdly, The cases in which a recovery has been held to be a bar to an executory limitation, have all been cases where the executory limitation was *subsequent* to and *expectant* on the estate-tail. And, Fourthly, The principle which governed these cases applies only where that feature occurs, and does not reach a case where the executory limitation is *antecedent* to the estate-tail.

There will therefore be two classes of cases. The first, consisting of cases like *Page v. Hayward*, where an estate-tail may be determined or abridged by an executory limitation or springing use annexed to it and expectant upon it. The second, consisting of cases—such as *Roper v. Hallifax* and the present case—where the springing use arises from a point anterior to the commencement of the estate-tail, and overreaches the entirety of it. In the first class of cases a recovery by the tenant in tail will bar the springing use—in the second class of cases it will not.

All text-writers on the subject expressly or impliedly

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recognize this distinction. In *Sugden on Powers* (a), the author supposes the case of an estate limited to a parent for life, and then to his children as he shall appoint by will, and in default of appointment to the children in tail, and observes—"The case has been considered similar to that of *Page v. Hayward*. To this opinion the author himself once inclined, but further consideration has induced him to consider the point very doubtful; for in *Page v. Hayward*, although the words expressed a condition, yet they were construed to be a limitation (b); and therefore it is the common case of a vested estate-tail with limitation over in a certain event, in which case it is quite clear that a recovery suffered before the happening of the event will defeat the limitations over. It is like the case put by *Hale, C. J.*, in *Benson v. Hodson*, of a tenant in tail with a limitation so long as such a tree shall stand (c); and he held that a common recovery would bar that limitation. But in our case the question would be, whether, during the life of the donee of the power, the estates to be created under the power would not be considered a charge upon the estate-tail." These observations were written prior to *Roper v. Hallifax*, and the correctness of them was confirmed by that case. The word "charge" is only another mode of describing the interests, which the plaintiff insists are not barrable. In 5 *Cruise's Digest*, c. x, s. 3, it is said, "no estates or interests are barred by a common recovery, but those which are subsequent in point of limitation to the estate of which the recovery is suffered; for all interests precedent remain as they were before." In *Burton's Compendium of the Law of Real Property* (d), after noticing that in the common case of a settlement with a power of sale and exchange to be exercised with the consent of the tenant for life, or tenant in tail in possession for the time being, the power is not barrable during the estate for life,—for which proposition he cites *Roper v. Hallifax*,—there is the following remark, "The

(a) P. 79, ed. 4; p. 80, ed. 5.

(c) *Suprà*, 737.(b) Vide *suprà*, 740 (a).

(d) Page 254.

tenant in tail in remainder cannot suffer a recovery without the concurrence of the tenant for life; and even this concurrence will not necessarily destroy the power; for his old estate for life may still continue, and while that lasts any shifting use arising by an exercise of the power given to the trustees must be *antecedent* to the estate-tail, and *paramount* to it in title, and therefore that power will still continue exercisable notwithstanding any act of the tenant in tail." In *Bailey on Fines and Recoveries* (a), it is stated on the authority of *Roper v. Hallifax* that, "A recovery by tenant for life, and remainder-man in tail, will not destroy a power which is *antecedent* to the estate-tail." In *Sanders upon Uses* (b), the same principle is distinctly stated and insisted on. *Sanders* says, "*Holt*, C. J., in *Page and Hayward*, having stated generally his opinion that a recovery will bar a condition or limitation collateral to the estate-tail, for the destruction of which it is suffered, it has been contended that a recovery will destroy a power originally reserved with a view to defeat such estate-tail. But a recovery has the effect of barring a collateral condition or limitation, on the principle that it bars all remainders expectant upon it, but it cannot affect a use *precedent* to the estate-tail of which the recovery is suffered, for the recoveror comes in as of the estate of the tenant in tail, and subject to all charges to which it is subject, and to all limitations preceding it." And afterwards he puts exactly the present case. "Suppose lands limited to the use of *A.* for life, with remainder to *B.* in tail, remainder to *C.* in fee, subject to a proviso that if a certain act be done within the compass of *A.*'s life, the uses limited to *B.* and *C.* should cease, and in lieu thereof the use should be to *D.* in fee; it could scarcely be contended that any act by the tenant in tail could defeat this springing use. It (*i. e.* the springing use) would not, in the sense in which the expression is used, *determine* the estate-tail of *B.*, but it would *prevent*

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(a) *Page* 229.(b) 1 *Sand. Us.* 76, 4th ed.

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its taking effect in possession (a). It would substitute another estate in lieu of the estate-tail." Before the action in *Roper v. Hallifax* was brought, an opinion had been written on the case, (which is printed in *Sanders on Uses*), (b) in which the same principles are relied on (c).

These authorities are confirmed in a satisfactory manner by the language of 3 & 4 *W. 4*, c. 74, which, as is well known, was not intended to alter the general powers possessed by a tenant in tail, and the 15th section of which excepts from the interests which may be barred by tenant in tail, "all estates *prior* to the estates-tail" (d).

In the preceding observations an attempt has been made to go fully into the principles and authorities affecting the present case. But the truth is, that a very cursory consi-

(a) As the estate-tail of B. had a legal existence before the springing use took effect, and ceased to have a legal existence by reason of its taking effect, the conclusion seems to be unavoidable, that the springing use *determined* the estate-tail, and that the estate-tail was prevented from taking effect in possession, *in consequence of such determination*.

(b) Vol. i. p. 426.

(c) To the opinions quoted in the text may be added that of another writer, the accuracy of whose judgment is well known, who, in treating of the effect of an assurance under 3 & 4 *Will. 4*, c. 74, upon executory limitations, puts the case of a power, analogous to that in the principal case, and concludes that the substituted assurance will not bar, as a "recovery would not have barred," the power; adding, that "in considering the effect of a recovery, or of its substitute, with reference to executory limitations, questions suggest themselves which cannot be satisfactorily solved upon ordinary

principles;" and that "it should rather seem that the Courts fell into the error of holding that the recovery of tenant in tail acquired the fee, discharged from the executory limitation, instead of holding that the recovery acquired the fee defeasible, as before, by the executory limitation."—Hayes's *Introd. Convey.* 2nd edit. 380, n. (151).

(d) The act (s. 15) gives to the tenant in tail a disposing power as against all persons claiming the land by force of the estate-tail, and all persons whose "estates (see the definitions in s. 1.) are to take effect *after the determination or in defeasance of*" the estate-tail. As this is a substantive enactment, made without reference to the construction which the Courts have put upon the old assurance by recovery, it may perhaps afford an opportunity for correcting the doctrine as to the power of a tenant in tail over springing uses, if on examination that doctrine shall appear to be unsatisfactory.

deration of the case, and of the principles affecting it, will enable the Court to arrive with confidence at the conclusion upon which the plaintiff insists. Thus, if lands be limited to the use of *A.* for life, with a limitation to trustees for a term of 1000 years, with remainder to *B.* in tail, it is clear that a recovery by *B.* will not affect the term of 1000 years (*a*). Upon the like principle, if the limitation be to *A.* for life, remainder to *B.* in tail, with a proviso that upon a given event happening during the life of the tenant for life, a term of 1000 years shall take effect between the life-estate and the estate-tail, it is clear that the springing use under this proviso could not be affected by the recovery. And the same conclusion necessarily follows if the term, instead of being for 1000 years, be for 10,000 years, or be indefinitely extended, or if the proviso be, that upon the given event happening during the life of the tenant for life, entirely new uses shall be substituted for the old ones. Or, lastly, the case may be put strongly and clearly in this manner:—If the recovery, instead of being suffered by Viscount *Lumley*, were suffered by a *remote* entailee,—for instance, by a son of *William Lumley*,—it seems impossible to conceive that such recovery could have the effect of barring the shifting use, supposing it to arise during the life of the defendant. But the only principle upon which that conclusion can be escaped from is, that the use is *pre-cedent* to the estate-tail of such remote entailee, and on that ground is not destructible; and this principle, if applicable in the one case, applies with equal force where the party vouched, instead of being a remote entailee, is entitled to a remainder in tail immediately expectant upon the determination of the life-estate. This concludes all that need be said upon the plaintiff's first proposition.

II. The plaintiff's second proposition is,—that as the event happened during the life of the defendant, the circumstance of the proviso's not having been restricted to that event makes no difference; that as, in the result, the

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Second propo-
 sition :
 Too great ge-
 nerality in
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(a) *Vide ante*, vol. i. 177, &c.

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case is the same as if the proviso had been restricted in the manner supposed by the first proposition, the legal conclusion ought to be the same also. But possibly an argument may be attempted to the effect—that by the recovery, the proviso would, according to *Page v. Hayward*, clearly be defeated, in case of the event not happening till after the defendant's death, and that this circumstance in some way affects the efficiency of the proviso, and prevents its operating at all. Such an argument would rest upon no solid reason—and in fact there is no room for raising any argument of the kind. For the shifting clause may be construed divisim, *i. e.* as containing in itself *several* provisos applicable to the estates of the respective takers,—that is, one proviso that if the given event shall happen during the estates for life, the uses shall shift, and so on a separate proviso for the time of each estate. Such a construction appears to have been adopted in *Boyce v. Hanning (a)*, where a power of sale given to trustees to be exercised with the consent of tenants for life, and after their deaths at the discretion of the trustees, was held valid,—apparently on the ground that the power might be considered as comprising two powers, one exercisable during the life-estates, which would be good, and the other exercisable after the determination of those estates. If the like construction be adopted here, the proviso applicable during the estate for life, is the proviso which, in the event, has taken effect, and therefore, according to the proposition already established, it is not affected by the recovery. These observations, however, enter into niceties which this part of the plaintiff's case does not require. The plain sense of the matter, and all that ought properly to be said on this part of the case, is, that the question arises upon a limitation *by way of use (b)*, and is, therefore, unaffected by any technical rules,—that in the event, the case put by the plaintiff's *second* proposition is identical with the case put by this *first* proposition,—and that the cases being identical, the legal consequences must be the same.

(a) 2 Crompt. & Jerv. 334.

(b) *Vide post*, 759, n.

Preston (with whom was *Armstrong*), for the defendant.

The defendant rests his case on four propositions.

I. The proviso for shifting the estates on the descent of the earldom, operated only on the estate for life of the defendant; and its effect was to determine the life-estate only, so as to give the estate over, not to the lessor of the plaintiff, but to Viscount *Lumley*; and therefore, admitting that the recovery has not destroyed the proviso, the plaintiff is not entitled to recover. The proviso for shifting the estate is in the nature of a proviso creating a forfeiture, and is to be construed strictly, to prevent, as far as possible, a forfeiture from being incurred, *Doe v. Yates* (a). The proviso for shifting the estate is preceded by a proviso for taking the name and arms of *Savile* (drawn with great skill), and which affords a key to the construction of the proviso in question. The name-and-arms clause contains, first, a proviso of cesser, directing that the estate of the party who neglects to take the name and arms shall cease; and secondly, a provision declaring the consequence of such cesser, viz. that the estate shall go over to the person next in remainder; and it is perfectly clear that the effect of this clause would be to determine the estate of that party only who neglected to take the name and arms. Analogy would lead us to expect that the clause for shifting the estates on the descent of the earldom, should have a similar operation, and that it would determine the estate of that party only who acquired the earldom. Accordingly, this is the effect of the clause. It contains, like the name-and-arms clause, two provisions, viz. first, a proviso of cesser, and secondly, a provision directing to whom the estate is to go. The proviso of cesser only determines the estate of the party who shall become earl, that is, in the present case, the estate of the tenant for life, the defendant. The directory provision cannot give over more than the proviso of cesser takes away; and as only the life estate of the defend-

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Defendant's

first proposi-

tion:

Operation of

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only.

(a) 5 Barn. & Alders. 554, and 1 Dowl. & Ry. 187.

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ant is given over, it must be intended that it should go over to the person next in remainder expectant on that life estate, viz. to Viscount *Lumley*. The result is supported and confirmed by this consideration:—If the tenant for life had died before the descent of the earldom, and the earldom had descended on a tenant in tail, it cannot be disputed that under the words of the shifting clause, according to any construction, the estates would have gone over to the next entailee, namely, the person next in remainder after the person who had become earl. The construction for which the defendant contends has the effect of carrying it over in like manner to the person next in remainder after the person who becomes earl, where the earldom descends on a tenant for life; whereas the construction for which the plaintiff must contend, would in the latter case carry it over not to the person next in remainder after the person who becomes earl, but to the person in remainder after that person *and his sons*; thus giving a different operation to the clause in the two cases.

In *Doe v. Heneage* (a), and in *Stanley v. Stanley* (b), where there were provisions for shifting the estates, the effect was given to the provisions which the defendant says ought to be given to the proviso here. In *Carr v. Lord Erroll* (c), a different effect was given to the provisions; but in that case the words could not be got over.

On these grounds, therefore, the defendant insists, that admitting the recovery not to have barred the proviso, the lessor of the plaintiff could have no title to enter.

Defendant's
second proposition:
Acceleration.

II. The effect of the proviso for shifting the estate on the descent of the earldom was, to accelerate the old remainders, not to confer new interests; and this is an answer to the plaintiff's argument, because the *acceleration* of the old remainders does not render them *antecedent* to the estate tail, and by the admission of the plaintiff, the recovery bars all except what is so *antecedent*. It has been

(a) 4 T. R. 13.


(b) 16 Ves. jun. 491.

(c) 6 East, 58.

already noticed, that the clause in question contains two provisions, viz. first, a proviso of cesser; and secondly, a provision of gift over; and it is obvious that the object of the clause might be effected by either of these provisions, without the aid of the other. Its operation is effected by means of the proviso of cesser. This construction must be adopted on these considerations:—Suppose the lessor of the plaintiff, before the proviso took effect, had granted an annuity chargeable upon his estate and interest in the property;—if the proviso takes effect by way of *cesser*, accelerating the old remainders, such annuity would continue a charge notwithstanding the operation of the clause; but if the proviso takes effect by way of *limitation of new uses*, the annuitant would have no charge on the new use and would be defeated;—a result which the Court will not sanction. Again, the provision of gift over directs that the estate shall go only to the person and persons *next in remainder*. If therefore the clause were to be held to take effect under the provision of *gift over*, it would carry the estate over to the *next* taker only. It is only by construing the clause to take effect under the proviso for cesser,—that is, by way of acceleration,—that all the persons entitled in succession in the old line of limitations can be made to take under it. For these reasons the provision must be held to take effect by means of the proviso of cesser, that is, by way of *acceleration*, and not by way of *new use*, and then the argument of the plaintiff, which rests wholly on the new use being *antecedent* to the estate-tail, necessarily fails.

III. The estate and interest of the lessor of the plaintiff is *subsequent*, or at least *collateral*, to the estate-tail of Viscount *Lumley*, the donee in tail. It is to divest the estate-tail after it is vested. Therefore, whether subsequent or collateral, it will, according to the rule as stated by the plaintiff himself, be barred by the recovery (*a*).

(a) It cannot be denied that the proviso "divests the estate-tail after it is vested;" and the distinction taken by the plaintiff between

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Defendant's
 third proposi-
 tion: Estate
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Defendant's
fourth propo-
sition: Fee of
recoveror, how
far derived
out of estate-
tail.

IV. Whatever construction is adopted, the plaintiff's reasoning is fallacious, and the proviso is destroyed by the recovery. The argument of the plaintiff proceeds on the principle that the fee gained by the recovery is derived out of the estate-tail. Such is not the principle. The true effect of a recovery is to gain a fee-simple "so far as the estate was in the donor." It is on this principle that charges on the estate of the donor are not barred by a recovery, and according to this principle it is clear that the proviso is barred. *Roper v. Hallifax* is distinguishable from the present case, by the circumstance that in that case it was not the intention of the parties to the recovery to bar the power:—on the contrary, the power was preserved, or revived by the declaration of the uses. Here, it was the intention to bar the proviso. The *intention* is the principle on which *Roper v. Hallifax* depends.

Campbell, A. G., in reply.

Defendant's
first propo-
sition.


I. The first proposition sought to be established by the defendant is in the teeth of the words of the proviso for shifting the uses. The result of that proposition would be, that the estate would go over to the issue of the person becoming earl, in the same manner as if such person were *dead*, when the words of the clause are, that the estate shall go over in the same manner as if the person becoming earl were *dead without issue*." The arguments too, by which the proposition is supported, are untenable. First, *Doe v. Yates* has no application to this proviso, because the object and effect of this proviso are not forfeiture, but a mode of disposition. Secondly, it is not true that the name-and-arms clause affords any key to the construction of the clause in question; for the nature and

springing uses *precedent*, and springing uses *subsequent*, to the estate-tail, obliges him to maintain that the proviso, though it goes to divest the vested estate-tail, is precedent, or "springs from a point antece-

dent" to the estate-tail; and *that* because an estate, on which the proviso is in nowise dependent, (*viz.* the estate for life,) happens to be precedent.

purposes of the two clauses are entirely different. The object of the name-and-arms clause was to enforce a compliance with the requisitions for taking the name and arms, by imposing a forfeiture in case of non-compliance; and of course such forfeiture is in all cases confined to the person to whom the punishment is due, and the estate is consequently in all cases given over to the person next in remainder (*a*). The object of the clause for shifting the estates on the descent of the earldom, was to make provision for a second branch of the family when an elder branch should succeed to the earldom and its concomitants—an object which would not be effected, in cases where the person who becomes earl is tenant for life, by giving the estate to the person next in remainder, that is, to the *son* of such person. In such cases it is necessary, in order that a second branch may be provided for, that the estate should go over to the person who would take the estates if the tenant for life were *dead without issue*. Thirdly, neither is it true that the construction for which the plaintiff contends, gives a different operation to the clause where a tenant for life and where a tenant in tail acquires the earldom. In the one case, indeed, the estate goes to the person next in remainder, and in the other it does not. But in both cases the estate is carried from the person who becomes earl to the brother of that person, or the issue of such brother, conformably with the design of providing for the next *branch*. Fourthly, *Doe v. Henneage* (*b*) and the other cases cited by the defendant, were decided (as this case must be) according to the particular words used in the will or deed.

II. The defendant's second proposition is incorrect, and if correct, would not affect the argument of the plaintiff. As stated by the defendant, the clause consists of two provisions; viz. first, a proviso of cesser, and second, a provision of gift over. The defendant contends that the opera-

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(*a*) Quære, next in *descent* or next in *remainder*.

(*b*) 4 T. R. 13; *suprà*, 748.

Defendant's
 second propo-
 sition.

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tion of the clause is affected by means of the former of these provisions, not of the latter. Now it will be observed that the proviso for cesser directs only that the estate of the party who becomes earl shall cease;—it does not direct that the estate limited to the *sons* of such person (when a tenant for life) shall cease. But the provision of gift over declares that the estate shall go over in the same manner as if the person who becomes earl were dead *without issue*. Therefore the latter provision goes further than the former; and in order that effect may be given to the whole intent of the clause, its operation must be under the second provision, viz. by way of *limitation of new uses*, and not under the previous provision, by way of *acceleration* merely. The supposed case of an annuity granted cannot influence the legal construction of the will; and it affords no argument on the ground of public policy (a), because in whichever way the proviso operates, such annuity would be a charge in equity. To the argument founded on the word “next,” it is a sufficient answer that the proviso directs the estate to go over “in the same manner” as the person or persons in remainder would take the same in case the party acquiring the title were *dead without issue*,—words which are sufficient to carry it to the several takers in succession.

But further, if the proviso were to be held to take effect by way of *acceleration* of the old remainders, and not as a *limitation of new uses*, it would not affect the argument of the plaintiff. The suggested construction cannot be supported on the proviso of cesser, because, in order to give effect, by way of cesser, to the intention that the estates should go over, as if the party becoming earl were dead without issue, it would be necessary that all the precedent estates should cease; whereas the provision of cesser in the present case makes the estate of the tenant for life only to cease. If therefore such construction is adopted at all, it must be by implying that the estate, originally limited in remainder to the lessor of the plaintiff,

(a) *Vide Rex v. St. Gregory, Canterbury, ante, 137.*

was intended in the given event to be accelerated ; that is, that such estate should, in the given event, take effect and spring from a point anterior to the determination of the particular estates upon which such remainder depends. And the result of such a construction would be, that the use limited to the lessor of the plaintiff by the will, has a capacity of taking effect in either of two alternate ways, viz. by way of remainder upon the natural determination of the particular estates, or by way of accelerated use antecedent to the determination of such particular estates. As the event has occurred, the use takes effect in the latter way, and springs from a point antecedent to the commencement of the estate-tail. Therefore in the event, according to the principles on which the use is not destroyed by the recovery, the circumstance that the recovery destroys the use, so far as it had a capacity of taking effect *subsequently* to the estate-tail, is no reason why the recovery should destroy it, so far as it had a capacity of taking effect *antecedently* to the estate-tail.

III. The plaintiff admits that the proviso is *subsequent* in the sense that it *divests* the estate-tail after it has become vested, but he denies that that circumstance renders it *subsequent* in the sense which is necessary in order that it might be barred by the recovery. The argument of the defendant was attempted in *Eales v. Cann*, and failed. *Roper v. Hallifax* is also a complete answer to it, because in that case the power divested the estate-tail after it had vested. The position is also met by the received rule in a case of daily practice. Suppose an estate to be limited to several successive tenants for life, *A.*, *B.* and *C.*, with remainder to their first and other sons in tail, and with powers of jointuring and portioning to each tenant for life, —the exercise of any one of the powers will defeat the estates-tail after they have vested ; but it cannot be contended that a recovery in which *A.* is tenant to the præcipe, and the first son of *C.* is vouchee, will bar the powers given to *B.* The true criterion for determining whether a

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 fourth propo-
 sition.

springing use is precedent or subsequent to the estate-tail, with reference to the present purpose, is, not whether it divests the estate-tail, but whether it springs from a point antecedent or subsequent to the estate-tail.

IV. The fourth proposition is answered by the original argument of the plaintiff. It is true that in *Roper v. Hallifax* the intention of the parties was different from the intention in the present case:—but the decision turned not on the *intention*, but on the power's being *antecedent* to the estate-tail.

Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court as follows:—

Upon this special verdict four questions arose:—

1st. Whether the proviso in the will of Sir *George Savile* respecting the shifting of his estates, in the event of the title of Earl of *Scarborough* descending upon the possessor of those estates, applied to any but the first person upon whom it should so descend?

2dly. If it did, whether the effect of that proviso, in the event of the title's descending on a tenant for life, was to let in the *son*, if any, of the tenant for life, until the title should descend on that son,—or to carry the estates over at once to the *next branch* of the family?

3rdly. Whether the recovery, suffered in 1812, destroyed the proviso?

4thly. Whether the deeds of 1817 barred the right of the lessor of the plaintiff to make the demise upon which this action is brought?

Upon the argument, the last of these questions was abandoned by the learned counsel for the defendant, who admitted that the deeds could neither operate by way of *conveyance* of any interest, nor by way of *estoppel* (a).

First question:
 Whether proviso confined to first descent.

I. The first question was material, because on the descent of the title to the first taker of the estates, they had shifted to the present defendant; and so it was contended that the

(a) See the authorities, *suprà*, 730 (b).

proviso was satisfied and at an end. This point was not, however, much pressed; and indeed it is plainly contrary to the *meaning* of the proviso, in which, although the words "from time to time" are not inserted, yet the obvious intent is, that the proviso shall attach to each of the estates created by the will, as they shall successively vest in possession.

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II. The second question was much laboured in argument; and it was contended that this proviso must be read and interpreted with reference, and by analogy, to the proviso respecting the taking of the name and arms of *Savile*. We think that it is only necessary to read the two provisos in order to be fully satisfied that as the motive and object of the devisor was different in the two, so the effect is, and was intended to be, different also. In the name-and-arms proviso, the cesser of estate was intended as a personal punishment, by way of forfeiture, against the individual neglecting to comply with it, and the distinction is carefully drawn between tenant for life and tenant in tail; for the estates are to "go to the *person* (in the singular number) next in remainder in this my will, in the same manner as if such person or persons so neglecting or refusing, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were actually dead without issue male." In the provision in question the cesser was not intended as a *punishment* to the individual, but to prevent the *union* of the earldom and these estates in the same person, and for the benefit of the next branch of the family. Accordingly the words used are different; for the estates are to "go to the person or persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease *and* failure of issue male of the person to whom the said title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of this my will, in case he or they to whom the title of the said Earl of S. shall come and fall in possession as aforesaid, was or were

Second question: Whether son let in, or estates carried over to another branch.

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actually dead *without issue*." These words, both in the description of what persons in remainder are to take and of the manner in which they are to take, plainly point at the exclusion of an *entire branch* of the family, and cannot receive the same construction as the words of the other proviso without doing great violence to the obvious meaning of the devisor, the framers of whose will evidently knew how to express his meaning in appropriate language. It is said that this construction will exclude the younger children of the defendant, who have no present benefit from the earldom. It certainly will exclude them, whether the earldom shall descend upon them or not; but this is no reason for putting a sense upon the words of the will which they cannot fairly bear; and it may be observed, that to both the provisos the devisor has added a clause protecting all jointures and portions for younger children duly settled before the cesser. It was said that the clause of cesser is the operative part of the proviso, and that the other words cannot *carry over* greater interest than that which is made to *cease*; but we see no reason for saying that the words of *cesser* are rather the *operative* words than those by which the estate is *carried over*; and if the latter be more extensive than the former, there is no authority to prevent them from receiving their full effect. We are therefore clearly of opinion that the effect of the proviso is,—on the descent of the title, to carry over the estates at once to the next branch of the family.

Third question: Effect of recovery.

III. We come now to the third question, on the effect of the recovery suffered in 1812 by the defendant, the tenant for life, and his eldest son, the tenant in tail in remainder. We have no hesitation in holding not only that this recovery barred and destroyed the estate-tail and all remainders expectant on the natural failure of that estate, but also that it destroyed the proviso in question, so far as it was attached to that estate-tail, and all remainders or *subsequent* estates that were limited to come into possession on the descent of the title upon the defendant's son or grandson, and so



on. *Page v. Hayward* (a) and other cases abundantly establish this position, which is fully sanctioned by the text-writers. Therefore the recovery undoubtedly barred and destroyed the vested remainder in tail of the present lessor of the plaintiff, expectant on the determination of the estate-tail vested in the defendant's son, and the executory limitation to the lessor of the plaintiff in the event of the descent of the title upon the defendant's son; and if the defendant had died in the life-time of his elder brother, the lessor of the plaintiff would have had no claim whatever in any event. Neither have we any hesitation in holding that if no estate had been limited to the lessor of the plaintiff, except such as was to take effect on the happening of the event contemplated by the proviso, so as that such estate would clearly be a *new interest* then first arising, the recovery would not have barred or destroyed the proviso, so far as it attached to the life-estate of the defendant,—and that the lessor of the plaintiff would, in the events which have happened, be entitled to recover.

It does not appear to us to be necessary to determine *to what extent* the estate of a recoveror in a common recovery, suffered by tenant in tail, is *derived out of* the estate-tail (b). It may be admitted that the recoveror cannot take a greater estate than the original donor had, and also that his estate is not derived *simply* from the estate-tail; and it may be admitted that a recovery suffered by tenant in tail of lands *ex parte maternâ*, will or will not alter the course of descent, according as the tenant in tail was himself in by purchase or by descent (c). This however is clear, viz.

(a) 2 Salk. 570, *suprà*, 737, 740.

(b) *Vide White v. West*, Cro. El. 792.

(c) A tenant in tail by *descent* (who must be in *as issue in tail*,) may be seised by descent *ex parte maternâ*; but it is conceived that a tenant in tail by *purchase*, who must therefore be a *donee* in tail,

cannot be seised *ex parte maternâ*, unless the gift be, to him and his heirs of the body of his mother, or to him and his heirs of the body of some other maternal ancestor; and *quare* whether, even in such case, the donee can properly be said to be seised *ex parte maternâ*.

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Whether fee-simple of recoveror derived out of estate-tail.

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that the estate of the recoveror is not derived out of the estate of the *tenant for life* when he is not *vouched*,—as he was not in this case.

The conveyance by the tenant for life, to make a tenant to the *præcipe*, is no forfeiture of his life-estate: it does not determine that estate, though where it is granted without any reversion being reserved to the grantor, the conveyance may have the effect of passing the life-estate wholly to another (a). This was not done in the present case, the conveyance being to the tenant to the *præcipe* for the joint lives of himself and the defendant, according to the practice adopted by conveyancers, in order more effectually to preserve powers annexed to the life-estate. It is a mere matter of form, in order to enable the tenant in tail in remainder to bar his estate-tail and the remainders over. Any person who has an estate in remainder between an estate limited to a tenant for life and an estate limited to a remote remainder-man in tail, is entitled, even after a recovery suffered by such tenant for life and remote remainder-man, to treat the life-estate as still subsisting, and to make his entry on the death of *cestui que vie*. It is conceded that no such *intermediate estates* are barred by such a recovery. Why then should this proviso attached to the life-estate (b) be barred? It operates

(a) Which reversion could only be in respect of some new tortious estate of inheritance, by creating which a forfeiture *would* be incurred. Where *A.*, tenant for life, demises to *B.*, for the joint lives of *A.* and *B.*, a reversion remains in *A.* in respect of that portion of *A.*'s life estate which may endure after the death of *B.* But the keeping of this reversion creates no forfeiture, as it does not arise out of any new tortious estate.

(b) Looking at the clause in question in what is conceived to be its true character,—that of a

proviso raising a springing use, there appears to be considerable difficulty in treating it as something attached or appendant to the estate for life, [see *Long v. Ranken*, Sugd. Powers, 5th ed. App. No. 3, for some very pertinent observations on the notion of the *appendancy* of powers, (i. e. springing uses,) by Lord Tenterden, C. J.] With respect to the inference that the proviso is *antecedent* to the estate-tail, because it prevents that estate,—not from arising or becoming vested *in interest*, but—from ever vesting *in possession*, may it

not by way of determining or defeating the estate-tail of the defendant's son, but *antecedently* to that estate, by preventing the estate-tail from ever vesting in possession, and being antecedent to that estate-tail, it cannot be affected by the recovery. *Roper v. Halifax* (a) is an express authority to this effect; which case has been much discussed, but never overruled (b). It is argued that that case was decided on the *intention* of the parties expressed in the deed to lead the uses; but it is quite plain, from the language of the judgment, that the point as to the recovery and its effect was determined by the Court without reference to the *intention* of the parties,—as indeed in reason and principle it ought to have been; and the intention of the parties was used only in answer to an argument arising upon

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not be urged, with parity of reason, that after the determination of the estate for life, the proviso is still *antecedent*, because it prevents the estate-tail from *continuing* to be vested in possession, or, in other words, from vesting *absolutely* in possession? In every stage, its effect is to prevent the estate-tail from being an *indefeasible* estate—to derogate from the otherwise fixed condition of that estate. It must be admitted that a proviso which is capable of defeating an estate-tail vested in possession, *overrides* that estate, if it does not *forerun* it.

Perhaps the embarrassment in which the doctrine appears to be involved may have arisen from not accurately marking the distinction between those limitations which *conform to*, and those which *depart from*, the rules of the common law, (*Vide ante*, 746.) When land is settled to the use of *A.* for life, remainder to *B.* in tail, remainder to *C.* in fee, it is said, and with strict propriety, that the estate of *A.*

is *precedent*, and the estate of *C.* *subsequent*, to the estate of *B.*; but, if at the same time a use is limited to *D.* in fee, in the event of his returning from Rome, (and let that limitation be supposed to occur in a totally different part of the instrument,—for the mind is very apt to be influenced, through the eye, by mere juxta-position,) it can scarcely be said, with propriety, that the limitation to *D.* is either *precedent* or *subsequent* to the estate of *B.* And it seems difficult to understand why any dealing with *B.*'s estate, *before* the event has occurred, should prevent the springing of this executory limitation whenever the event may occur; much more why a dealing with that estate *after* it has fallen into possession, should have the effect of excluding the executory limitation.

(a) 8 Taunt. 845. And see another report of the case, Sugd. Powers, 5th ed. Appendix, No. 4.

(b) See 1 Sanders on Uses and Trusts, 176, 427, 436, 4th ed.

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the effect of the deed itself, which was the second point in the case.

The 3 & 4 *Will.* 4, c. 74, s. 15, has been referred to; but that statute is expressed in general terms, and proves only (what in reality is not disputed as a general proposition) that a recovery will not affect estates prior to the estate-tail of the tenant in tail by whom such recovery is suffered.

It being then our opinion that the proviso in question, if a new interest arises from the happening of the event contemplated by it, is not barred or destroyed by the recovery, the only remaining point is, whether the limitation to the lessor of the plaintiff of a remainder expectant on the natural termination of the estate-tail in the defendant's son, makes any and what difference. It is argued, on the part of the defendant, that the proviso,—supposing no recovery to have been suffered and the title of Earl of S. to have descended on the defendant,—would have operated only to accelerate and vest in possession that estate of the lessor of the plaintiff which was already vested in him in remainder; and that as that vested remainder was barred and destroyed by the recovery, it cannot, by the happening of any subsequent event, revive, be accelerated, and vest in possession. On the other side it is contended either that it may so revive, or that the proviso will operate so as to create a new interest, and that the lessor of the plaintiff took under the will two interests,—one a *vested remainder* in tail, which is barred,—the other a mere *possibility*, which, on the descent of the title upon the defendant, became a new estate-tail, and which is not barred. The words of the will in effect are, that the estate shall go to the lessor of the plaintiff in the same manner as he would take the same under the will, if the defendant were dead without issue. A condition is added in these words—"such person and persons so in remainder performing, and complying with, the condition or proviso hereinbefore contained for taking and using the surname and quartering the arms of

*Savile* as aforesaid,"—which, it is argued, shews that a new estate was intended to arise, otherwise why add these words of condition? for if its effect were merely to accelerate the old estate, the name-and-arms proviso was already attached to it. It is answered that the condition was added for greater caution, and that at all events it cannot alter the legal construction of the will, whatever arguments the insertion of such a condition may be supposed to furnish as to the *opinion* of the person by whom the will was framed.

Two reasons are assigned why the Court should hold the proviso in question to operate by way of *acceleration*;—the one, that otherwise no charge made by the lessor of the plaintiff, upon his estate in remainder prior to the descent of the title on the defendant, would remain a charge on the happening of that event, because the lessor of the plaintiff would take a new estate;—the other, that otherwise the *next* person in remainder only would take, and not *all others in succession*,—as would be the case if the remainders were only *accelerated*.

As to the first of these reasons, we do not think that the consequence pointed out (supposing it necessarily to follow) is of sufficient moment to have any influence on the legal construction of the will; and we by no means accede to the construction assumed, though we are not now required to discuss it.

As to the second reason, the words of the proviso—"the person and persons next in remainder, in the same manner as such person or persons would take in case," &c.—seem to point to a *succession* of persons; but if not, still the lessor of the plaintiff may take an estate-tail; and it is not necessary now to determine whether those in remainder after him can take anything or not. No authority upon this part of the case was cited at the bar, nor have we been able to discover any. The general intention of the deviser appears to be clear, viz. that his estate should never

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go in the same line or to the same persons as the earldom,—and that if any person, being tenant for life of his estates, should become Earl of S., the remainder in tail to that person's children should never vest, but the estates should go over as if that remainder in tail had never been created. By holding that a new estate arose in the lessor of the plaintiff on the descent of the title on the defendant, we are giving effect to that intention as far as we can. And we are not aware that in so doing we are contravening any rule of law. There is no inconsistency in treating the will as giving to the same person an estate-tail vested in remainder, and also the possibility of a similar, though not the same estate-tail, on the happening of a certain event; the former of which is barred by the recovery, the latter not. If we were to hold the contrary, this inconsistency would follow,—that the defendant, the tenant for life, would, by reason of his son's having barred the entail, hold the estate together with the title,—a thing quite contrary to the intention of the deviser, apparent upon the face of the devise,—there being no rule of law to compel such a departure from the intention of the deviser.

For these reasons we are of opinion that the plaintiff is entitled to recover, and that the judgment of the Court of Common Pleas ought to be reversed.

Judgment reversed (a).

(a) A writ of error in Dom. Proc. is understood to have been brought.

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In the matter of HENRY ROSS, Gent. one &c. and  
JOSEPH HODGSON, Gent.

IN Hilary term, *Baines* obtained a rule, calling upon *Ross* to shew cause why he should not be struck off the roll of attorneys of this Court, and upon *Hodgson*, to shew cause why he should not be committed to the prison of this Court for a period not exceeding one year,—pursuant to 22 Geo. 3, c. 46, s. 11.

This rule was obtained on the ground that *Hodgson* had, in Trinity vacation, 1834, practised as an attorney of this Court, being a person unqualified so to practise, and that *Ross*, knowing that *Hodgson* was not duly qualified to practise, had acted as his agent, and had allowed *Hodgson* to practise in *Ross*'s name (a). *Hodgson* had been regularly admitted as an attorney in 1827, and had practised for some time as such at Gisburn, in Yorkshire, but had omitted to obtain his certificate for the year ending 15th November, 1831, and also for the year ending 15th November, 1834.

Sir G. A. Lewin (for *Hodgson*), and F. V. Lee, (for *Ross*), now shewed cause. This question is upon the act of 22 Geo. 2, c. 46, s. 11 (b), and it is submitted that inasmuch

(a) It appears to be due to the parties to state that some of these facts were at least *doubtful* upon the affidavits, and were disputed in the arguments; but the Court disposed of the case on the *question of law* only, and in so doing proceeded on an assumption of these facts.

(b) "And whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys or solicitors,

and by various subtle contrivances, intrude themselves into, and act and practise in, the office and business of attorneys and solicitors, to the great prejudice and loss of many of his majesty's subjects, and the scandal of the profession of the law; be it therefore enacted, that from and after &c., if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account or for the profit

A person who has been regularly admitted as an attorney, but who is off the rolls by reason of his having neglected to take out his certificate for one whole year, is not an "unqualified person" within the meaning of sect. 11 of 22 Geo. 2, c. 46.

But he may be proceeded against by virtue of the general jurisdiction of the court over its officers, if he takes upon himself to act as an attorney. *Semble.*

Whether a person who had been struck off the roll for misconduct, would be an "unqualified person" within 22 Geo. 2, c. 46, s. 11, *quare.*

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as *Hodgson* had once been admitted, in the regular course, to practise as an attorney, he cannot be considered as "a person not *duly qualified* to act as an attorney," within the meaning of that statute. The first statute which makes any enactment respecting attorneys allowing persons unqualified to practise in their names, is 3 *Jac.* 1, c. 7, which, in section 2, to avoid the infinite numbers of solicitors and attorneys, enacts that none should thenceforth be admitted attorneys in any of the King's Courts of Record at Westminster, but such as had been brought up in the same Courts, or were otherwise well practised in soliciting of causes, and had been found by their dealings to be skilful and of honest disposition; and that none should be suffered to solicit any causes in any of the Courts aforesaid, but only such as were known to be men of sufficient and honest disposition, *and that no attorney should admit any other to follow any suit in his name*, upon pain that both the attorney and he that followeth any such suit in his name, should each of them forfeit for such offence 20*l.*; and that the attorney in such case should be excluded from being an attorney for ever thereafter. The object of this enactment (which was continued by 2 *Geo.* 2, c. 23, s. 17, and 12 *Geo.* 2, c. 13,) is evidently to protect the public against the ignorance or the malpractices of unqualified persons, and therefore it provides that such only as are known to be skilful and honest

of any *unqualified person or persons*, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, that such sworn attorney or solicitor

hath offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year."



shall be admitted to practise as attorneys, and that attorneys shall not allow unqualified persons to practise in their names. After the statutes above referred to, comes the 22 Geo. 2, c. 46, upon sect. 11 (a) of which this motion is founded; and upon reading the preamble of that section, and considering it in connection with the previous statutes, it will be evident that the object of that enactment also is *the protection of the public* from the evil consequences which would ensue, if persons who had not undergone an examination, and been sworn and admitted to act as attorneys, were not prohibited from practising as such, in conjunction with, or by the assistance or connivance of sworn attorneys. It is to be observed, that there is not a single instance in the reports, of an application of this sort, in a case where the party alleged to be unqualified had at any time been either *examined*, *sworn*, or *admitted* to act as an attorney. *Hodgson* was, it cannot be denied, *off the rolls* in Trinity vacation, 1834, but he was so by reason only of the provisions of the act of 37 Geo. 3, c. 90, respecting attorneys' certificates. Such a case as this cannot by possibility have been contemplated by the legislature, at the time of passing 22 Geo. 2, c. 46, nor is the case within the object or intention or the words of that statute. Moreover, the 37 Geo. 3, c. 90, is an act passed for mere purposes of *revenue*.

*Baines*, contrà. *Hodgson* had, for the space of more than one whole year, from some 1st November, *neglected to obtain his certificate* according to the provisions of 37 Geo. 3, c. 90, and therefore at the time of the practising complained of, he was a *person unqualified* within the meaning of 22 Geo. 2, c. 46, s. 11. By section 31 of 37 Geo. 3, c. 90, it is enacted, that every person admitted, sworn, inrolled or registered, who, from and after the 1st November, 1797, shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own

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name, or in the name of any other person, in any of the said Courts, by virtue of such admission, entry, inrolment or register, and that the admission, entry, inrolment or register of such person, in any of the said Courts, shall be from thenceforth *null and void*. Hodgson's admission was therefore wholly *null and void*, and, consequently, he cannot be said to have the qualification adverted to in the preamble or the enacting part of 22 Geo. 2, c. 46, s. 11. In *Slack v. Wilkins* (a), the Court of Exchequer held, that a person who had been regularly admitted and inrolled, but who was off the roll by reason of his having neglected to take out his certificate for two years, was liable to the *penalties* imposed by section 12 of 22 Geo. 2, c. 46, for practising as an attorney. Yet the preamble of that section shews that the object of the enactment was to protect the public from the ignorance of persons "who have never been regularly bred to the law, and are ignorant of the forms and operations thereof." This preamble is stronger than that of section 11. A person whose admission is declared by act of parliament *null and void*, can be in no better situation than a person who was *never* admitted.

LORD DENMAN, C. J.—I think that the rule must be discharged, because I am of opinion that the case is not within the 11th section of 22 Geo. 2, c. 46. It is quite plain that the object of that and the previous enactments is to prevent persons unqualified, by reason of want of skill and of character, from practising as attorneys. The qualification or security required by 22 Geo. 2, c. 46, s. 11, is, that the person shall have been *examined, sworn, and admitted* to act as an attorney. I think that the *qualification* must include all the three particulars, and that therefore a person's having been examined and sworn only, is not sufficient, notwithstanding that the word "or" is used. Then it is argued, that inasmuch as the admission and inrolment of *Hodgson* were, in the terms of 37 Geo. 3, c. 90, s. 31,

(a) 1 Crompt. & Mees. 23.

"null and void," by reason of his having neglected to take out his certificate, he cannot be said to be a person "*admitted* to act as an attorney." It is argued, that when a man's admission has become *wholly null and void*, he is in the same situation as if he had *never* been admitted. This is a fair argument upon the very *words* of the statute; but when I come to look at the *object* of the enactment, I must say that I think these words are controlled. The sole object of 37 Geo. 3, c. 90, is to secure the payment of the certificate money; and although the penalty is, that where the attorney neglects for a whole year to take out his certificate, his admission shall be void, yet I do not think that the enactment can be so far imported into section 11 of 22 Geo. 2, c. 46, that we can say that this case comes within that section. My opinion is *fortified*, not shaken, by the 12th clause, upon which the Court of Exchequer have decided; because in that section these words occur, "and unless such person shall *continue so entered upon the roll* at the time of such his acting in the capacity aforesaid." The Court of Exchequer thought that the defendant was liable to the *penalties* of the 12th section, because his admission and enrolment had been set aside by section 31 of 37 Geo. 3, c. 90; and this was a conclusion which it was impossible for them to resist. But no such words as those I have mentioned are found in section 11; and I think that this person cannot be said to want either of the three things which are required by that section to make a *qualification*. At the same time I am not prepared to say, that a person who having once been examined, sworn, and admitted, is afterwards *struck off* the roll, and subsequently acts as an attorney, would not be liable to be proceeded against under the general authority of the Court over its officers. On the contrary, such person would, I think, be liable,—as he affects to be an officer of the Court.

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LITLEDALE, J.—The object of 22 Geo. 2, c. 46, s. 11, appears to me to be to prevent persons not having served a

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clerkship, and not having been examined, sworn, and admitted, from practising as attorneys. Here, the party did serve his clerkship, and was examined, sworn, and admitted, and was at one time, therefore, clearly without the purview of this clause. Subsequently, however, to 22 Geo. 2, it was enacted, by 37 Geo. 3, c. 90, that if an attorney should neglect for one whole year to take out his certificate, his *admission* and *inrolment* should be thenceforth *null and void*. The object of this enactment was solely to enforce a mere matter of revenue; yet still if it brought the case within the other statute, we ought to give effect to it. But I think that though the admission is declared *null and void*, the party is not, by reason of that declaratory provision, made liable under sect. 11 of 22 Geo. 2, c. 46. Besides, the declaration that the admission shall be "null and void," is in some manner controlled by the proviso that the Court shall have power to re-admit upon payment of the arrears of duty and a fine.

I have no doubt, however, that if *Hodgson* should be found to have offended, notwithstanding that he is not regularly an officer of the Court, we ought in some way or other to proceed against him (a).

PATTESON, J.—I have had considerable difficulty in coming to a conclusion upon this question, because it seems to me very difficult to distinguish between the case of a person who is *struck off the roll for misconduct*, and one who is off the roll because he has neglected for one whole year to take out his certificate. It is not however necessary to decide as to the case of a party *struck off the roll for misconduct*; perhaps that case may be distinguishable, though it is difficult to see in what way. The qualification required by sect. 11 of 22 Geo. 2, c. 46, consists of examination, swearing, and admission. Here, certainly the party has been examined, sworn, and admitted. Afterwards, by virtue of another statute, his admission had become void. Still,

(a) *Semble*, that for an unauthorized stranger to assume to act as an officer of a court, would be a contempt of that court.

however, part of his qualification, as to examination and swearing, continued, for it would not be necessary to re-examine and re-swear him, upon his being re-admitted under 37 *Geo. 3*, c. 90. I do not think that this person comes within the purview of 22 *Geo. 2*, c. 46, s. 11. But I would by no means be understood to say, that in *every* case of an attorney's name being taken off the roll, we should come to the same conclusion. Where a party is struck off the roll for misconduct, the case might be the same as if *all* his qualification was nullified, which would make that case distinguishable (*a*). And even if that section of 22 *Geo. 2*, c. 46, is not applicable, there are other sections of other acts which would apply to such a case.

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COLERIDGE, J.—The act of 22 *Geo. 2*, was passed with an object totally different from that of 37 *Geo. 3*. In this penal proceeding it is most important to see that the case is within the *intent* of the act, before we venture to proceed upon it. The preamble to the section is therefore very material, as shewing the intent,—and besides, the enacting part refers to the preamble (*b*). The object of the act appears to be to prevent persons who have never been examined, sworn, and admitted, from practising as attorneys, to the great loss and prejudice of his majesty's subjects, and to the scandal of the profession of the law;—all which points to the want of that sanction which is given by the examination by a judge, and the swearing and admission of the party. It points rather to qualification *de facto*. Looking at the preamble and enactment, it is too much to say, that because the party has forfeited for a time the privilege of practising as an attorney, he is become a *person unqualified* within the meaning of 22 *Geo. 2*. The words “null and void,” occurring in 37 *Geo. 3*, must be taken with some qualification;

(*a*) In this view of the case, it would rather seem that if an attorney struck off the rolls for misconduct were afterwards readmitted, he must undergo the same exami-

nation &c. as upon his original admission.

(*b*) Vide *Bennett v. Daniel*, 10 Barn. & Cressw. 500, and 5 Mann. & Ryl. 444.

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for the party may be *re-admitted* merely upon payment of the arrears of duty, and a fine, which, according to the practice of the Courts, is generally little more than nominal. We should be going too far to say, that because the party is within the section of 37 *Geo. 3*, he is also within this highly penal statute, passed with a different intent.

Rule discharged without costs.

SPENCER v. PARRY.

1. An offer of a cognovit after action brought, will not support a count upon an account stated.

2. By a local act, the landlord or the receiver of the rents, and not the tenant, is rendered liable to pay the poor-rates.

By a written agreement, *A.*, the tenant, agreed with *B.*, the landlord, to pay the rent clear of all rates and taxes. After occupying the premises for some time, *A.* quitted them, leaving poor-rates and land-tax unpaid. The receiver of the rents was compelled to pay the rates,

**DEBT** for money paid, for money had and received, and on an account stated. Plea: *nunquam indebitatus*.

On the trial before *Patteson, J.*, at the sittings for Middlesex, in Trinity term last, the following facts appeared:

The defendant occupied, as tenant to the plaintiff, a house in St. Giles's, Middlesex, and had, by a written agreement, contracted to pay the rent, clear of all deductions for the land-tax, assessed and other taxes, and parochial rates. By a local act of parliament, the landlord of houses, and the receiver of the rents of the houses, in the parish of St. Giles, are severally liable to pay the poor-rates (*a*). The defendant occupied the house for some time, and then quitted it, leaving unpaid 2*l.* 12*s.* 6*d.* land-tax, and 1*l.* 17*s.* 6*d.* poor-rates. The receiver of the plaintiff's rents was distrained upon for the poor-rates, and a new tenant of the house was compelled to pay the land-tax. The plaintiff repaid these sums to the parties who had respectively paid them, and commenced the present action to enforce the repayment of those sums to him. After the commencement of the action, the defendant offered to give a cognovit.

(*a*) For the provisions of this act, see *Res v. Hall* and *Dyer, Esqrs. ante*, 546.

and the succeeding tenant the land-tax; which rates and land-tax were repaid to them by *B.*:—Held, that *B.*'s remedy was on the special agreement, and that he could not recover these sums from *A.* as money paid to *A.*'s use.

It was contended, on the part of the defendant, that the action should have been assumpsit on the special contract. The learned judge intimated that he should nonsuit the plaintiff, giving him leave to move to enter a verdict for the sum claimed. It was objected, on the part of the plaintiff, that the offer of a *cognovit* was sufficient to support a verdict on the count upon an account stated. The learned judge being of a different opinion, nonsuited the plaintiff.

In Trinity term *Hutchinson* applied to the Court for a rule nisi to enter a verdict, or for a new trial, on two grounds; first, that the offer of a *cognovit*, after action brought, was sufficient to sustain a verdict on an account stated; and secondly, that the remainder of the evidence entitled the plaintiff to sustain the action on the common counts for money paid &c.; and for this he cited *Exall v. Partridge* (a), *Brown v. Hodgson* (b), and *Dawson v. Linton* (c). The Court refused the rule on the first ground, and granted it on the second. Against this rule,

*Alexander* now shewed cause. The cases on this subject are collected in *Williamson v. Henley* (d), and establish the rule that a plaintiff cannot recover upon a count for money paid, where there is a subsisting contract between the parties, and where the defendant is not primarily liable. In *Cooke v. Munstone* (e), there was a count on a special agreement, and a count for money had and received. The defendant had contracted to supply the plaintiff with a quantity of soil or breeze, and plaintiff had paid a sum of money to the defendant as earnest of the bargain. At the trial, the plaintiff failed in proving the agreement, as stated in the first count, which it appeared was a subsisting contract between the parties, and it was held that he could not recover;—not on the first count, by reason of a variance,—nor on the general count, because the original contract was in

(a) 8 T. R. 308.

(b) 4 Taunt. 189; *infra*, 772, 6.(c) 5 Barn. & Alders. 521: *infra*, 773, 776.

(d) 6 Bingh. 299; 3 Moore &amp;

Payne, 731; *infra*, 774.

(e) 1 N. R. 351.

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force. In *Lightfoot v. Creed* (a), the defendant contracted to transfer to the plaintiff, on a certain day, a certain amount of stock, but failed in so doing. Upon this the plaintiff purchased the amount of stock agreed to be transferred, and brought his action for the consequent loss, declaring on a count for money paid. The Court held that such count was not maintainable, and that the plaintiff should have declared specially. *Child v. Morley* (b) is a similar case. *Exall v. Partridge* (c), *Brown v. Hodgson* (c), and *Dawson v. Linton* (c), are all distinguishable from the present case. In *Exall v. Partridge*, the goods of a stranger on the premises of another were distrained by the landlord for rent in arrear, and the stranger was *obliged* to pay the rent in order to redeem them. It was held that the stranger might maintain assumpsit against the original lessees, for money paid to their use, inasmuch as they were *bound* by their covenant to pay the rent to the landlord, and that it made no difference that some of them had, to the knowledge of the plaintiff, and previously to his placing his goods on the premises, assigned (d) their interest to one of their co-lessees, who was in the exclusive possession at the time. The distinction between that and the present case is, that *there* the defendants were *primarily* liable, and the money paid by the plaintiff discharged them from such *legal* liability; whilst *here*, either the landlord or the receiver is *primarily* liable, and not the defendant. He is liable only under the agreement, and that has not been declared upon. In *Brown v. Hodgson*, a carrier, by mistake, delivered to B. goods sold and consigned to C. B. appropriated the goods, and the carrier, on demand, paid C. their value. It was held, that the carrier might recover the money paid by him, from B., as money paid to his use. There B. was primarily liable to C. for the wrongful conversion of his goods, and the carrier, by paying their value,

(a) 8 Taunt. 268.

(b) 8 T. R. 610.

(c) *Suprà* 771, *infra* 776.

(d) Such an assignment would enure as a *release*, and would be necessarily so described in pleading.

discharged *B.* from such liability. Here, however, the plaintiff, by paying the rates and taxes, did not discharge the defendant from any liability other than what the agreement imposed, and that was not declared upon. In *Dawson v. Linton (a)*, a local drainage tax act charged with the payment of the tax those tenants in whose time it accrued due, and enabled them to deduct it out of the rents payable to their landlord. It also provided, that in case of neglect to pay, the tax might be levied by distress on the goods which should be found on the premises. An outgoing tenant paid his rent in full, but left property on the premises, which was distrained for the tax accruing due during his tenancy, and he was obliged to pay it in order to redeem them. It was held that he might recover the amount in an action against his landlord, for money paid. There, the act, although seemingly imposing the liability on the tenant, really imposes it on the landlord, for his rent is to be the fund ultimately chargeable. He might well therefore be sued as for money paid to his use. But, in the present case, unless founded on the special agreement, there is nothing to shew the liability of the tenant, and the declaration is silent as to such agreement. There is, consequently, a clear distinction between the three cases cited, on moving the rule, and the present case, which falls therefore within the principle first laid down, and that principle negatives the liability of the defendant under the present form of declaration.

Sir *W. Follett*, A. G., in support of the rule. All that is necessary to support this action is, that as between the plaintiff and defendant, the defendant be bound to pay the money which has been already paid by the plaintiff. If the plaintiff has been *compelled* to pay the money, he may recover the money he has paid on this form of action. This is the distinction which runs through all the cases. It is not disputed that, as between the plaintiff and defendant,

(a) *Suprà* 771, *infra* 776.

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the latter was bound to pay. In *Williamson v. Henley* (a), the declaration stated that the plaintiff, at the request of the defendant, and upon the defendant's undertaking to indemnify him, defended an action brought to recover money in which the defendant claimed an interest,—that judgment was given against the plaintiff for 42*l.*,—and that he was imprisoned, and paid the money under a *ca. sa.* It was held that the plaintiff might recover upon this count, or even on a count for money paid to the defendant's use. [*Patteson, J.* There the action was defended at the special request of the defendant. I said at the trial, either that the defendant must be *primarily* liable to pay the money sought to be recovered from him, or that there must be an *express request*, on the part of the defendant, to pay the money.] In *Williamson v. Henley* there was a special count; but it was said by *Tindal, C. J.*, in delivering the judgment of the Court, that the plaintiff could have recovered on the count for money paid. [*Patteson, J.* That portion of the judgment was extra-judicial.] Not precisely so, as there was an argument whether there was evidence sufficient to support the special count. The Court was of opinion that there was sufficient evidence, but that supposing that had not been the case, the action was maintainable on the common count. *Lightfoot v. Creed* is inapplicable. Here, the plaintiff was *compelled* to pay, and was thereby *authorized* to pay. The cases have established this,—that if a plaintiff be compelled to pay, it is equivalent to an *express request*. The plaintiff here did not voluntarily interpose, but was compelled to pay the money. The legal compulsion existing, the law will raise an implied agreement to repay the plaintiff. It was the default of the defendant which made it compulsory on the plaintiff to pay the money. If the circumstances are sufficient to imply an authority, the action is maintainable. In no case is it laid down that the defendant must be *primarily* liable. [*Patteson, J.* Here, but for the agreement, the *plaintiff* would have been

(a) *Suprà*, 771.

primarily and ultimately liable. None of the cases appear to approach this question.] *Exall v. Partridge*, and *Child v. Morley*, are authorities for the plaintiff. *Dawson v. Linton* is exactly in point. The only difference between that case and the present is, that in the former the liability arises from a local act of parliament; in the latter, it arises upon an agreement between the parties. *Brown v. Hodgson* is stronger than the present case. There, the carrier had been guilty of negligence, yet he was allowed to maintain an action for money had and received, to recover money which he had paid, and which he might have been legally compelled to pay. [*Patteson, J.* Under this act of parliament, the defendant was not liable to pay. By the land-tax acts, a tenant who pays that tax has a right of action against the landlord, who is therefore generally the person ultimately responsible for the payment. *Coleridge, J.* In *Schlencker v. Morsy (a)*, a lessee underlet part of the demised premises by deed, and the original landlord distrained for rent in arrear upon the under-tenant. It was held that assumpsit would not lie by the latter against his lessor, upon an implied promise to indemnify him against the rent payable to the superior landlord, the remedy being expressly provided by another mode of proceeding.]

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Cur. adv. vult.

Sir *W. Follett* referred the Court to *Chitty on Pleading (b)*, *Fisher v. Fallows (c)*, and *Carter v. Carter (d)*.

Lord DENMAN, C. J., on a subsequent day in this term, delivered the judgment of the Court, as follows :

The plaintiff had, by a written agreement, demised a house to the defendant, at a certain rent, clear of land-tax and of all parochial taxes. The defendant quitted the pre-

(a) 5 Dowl. & Ryl. 747; 3 Barn. & Cressw. 789.

(b) 5th edition, vol. i. p. 384.

(c) 5 Esp. N. P. C. 171.

(d) 5 Bingham 406; 2 Moore & Payne, 732.

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mises at the end of his year, having paid his rent, but leaving the land-tax and rates unpaid. The plaintiff relet the house. The new tenant was obliged to pay the land-tax, and the plaintiff's agent, under a local act of parliament, was distrained upon for the rates, and paid them. Both these sums were repaid to the parties by the plaintiff.

This action was brought to recover the amount of the land-tax and rates, as money paid to the defendant's use. It was objected at the trial that the form of action was misconceived, and that the defendant, though liable on his agreement to pay the whole amount of the rent, including the rates, could not be charged with this money as paid to his use. My brother *Patteson*, being of this opinion, directed a nonsuit, which we think right.

The only doubt we felt in the course of the argument, arose from the cases of *Brown v. Hodgson* and *Dawson v. Linton*, which seemed nearly to resemble the present. In the former of those cases, a carrier, having by mistake delivered *A.*'s goods to *B.*, who made them his own, paid *A.* the price, and was afterwards allowed to recover it from *B.*, as money paid to his use. But this was *in fact* money paid to *B.*'s use, for it was paid in discharge of his debt to *A.* And it may be fairly said to have been paid at his instance, because he knew that the plaintiff's mistake in delivering goods to him, made the plaintiff liable to pay the price to the true owner. His so receiving the goods may be considered as equivalent to saying, "If you pay *A.* (as you may be compelled to do) for the goods, I will reimburse you." In the case before us, the defendant was not liable to pay the money to any one but the plaintiff, and his liability to pay *the plaintiff* was by virtue of the *agreement*.

In *Dawson v. Linton*, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained upon for a tax made payable by the tenant, but which the local act gave him power to deduct from his rent. The plaintiff paid the tax to redeem his goods, and the Court thought that it was money paid to the landlord's use, because the landlord

was ultimately liable. The defence was, that the money was paid to the use of the tenant for the time being, who was primarily liable. But here the plaintiff's payment relieved the defendant from no liability, but what arose from the *contract* between them. The tax remained due by his default, which would give a remedy on the agreement; but the amount was paid to persons who had no claim *upon him*, and therefore it was not paid for *his use*.

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Rule discharged,

SOADY v. WILSON.

TRESPASS by the clerk of the minutes to the commissioners for auditing the public accounts, against a bailiff to the commissioners of sewers for the city and liberty of Westminster, and part of the county of Middlesex, for taking and distreining a table. Plea: the general issue.

The case was not brought to trial, but after issue joined, the parties, by consent and by order of *Littledale, J.*, stated the following case, for the opinion of this Court, and agreed that a judgment should be entered for the plaintiff or for the defendant, by confession or by nolle prosequi, immediately after the decision of the case, or otherwise, as the Court might think fit.

The office of the commissioners for auditing public accounts is in the eastern wing of Somerset House, which is in the parish of Saint Mary-le-Strand, in the city and

All persons whose property derives any advantage from the works of the commissioners of sewers, may be assessed to the sewers-rate in respect of that property.

And property drained by sewers and drains originally made and always repaired by persons independent of the commissioners of sewers, and deriving no immediate

benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.

Held, that apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are ratable by the commissioners of sewers for the city and liberty of Westminster, and parts of Middlesex, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances, for the purpose of establishing within the same that amongst other public offices.

By 52 Geo. 3, c. xlviii. s. 7, all persons are liable to be rated to the sewers-rate, as occupiers of premises ratable thereto, who are *de facto* rated in respect of such premises to the poor-rates of the parishes to which that act applies.

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liberty of Westminster, and in the district of the eastern division of the Westminster Sewers.

By 15 Geo. 3, c. 33, s. 16, Somerset House, with all its rights, members, &c. was declared to be vested in His Majesty, His heirs and successors, *free from all incumbrances* whatever, for the purpose of erecting and establishing within the same (amongst other public offices in the said act enumerated) the *office of auditors of the imprest*.

By 25 Geo. 3, c. 52, the office of auditors of the imprest was determined, and the office of the commissioners for *auditing the public accounts* was established in its place. The plaintiff is the *principal clerk to the commissioners in that office*.

Neither the commissioners for auditing the public accounts, nor the plaintiff, reside *in the audit office*, nor is there any room or place in the said office fitted up for the purpose of residing or dwelling therein. The attendance of the commissioners and of the plaintiff at such office, is only from ten o'clock to four, for the purpose of discharging the duties of their respective offices. The persons who sleep on the premises appropriated to the office of the said commissioners, are the office-keeper and one of the messengers attached to the office, who inhabit three sitting-rooms, five bed-rooms, two kitchens and offices, two pantries, a small passage-room, a beer-cellar, and a wash-house. The commissioners, the plaintiff, and the messenger, are paid by salaries; but no deduction is made from the salary of the commissioners or of the plaintiff, in respect of the use made by them of the said office, nor from the salary of the said messenger in respect of his sleeping therein. The case then set out the statute of sewers, 23 Hen. 8, c. 5, s. 3 and s. 9 (a), and the statute 3 & 4 Edw. 6, c. 8 (b).

(a) The statute of sewers, (23 Hen. 8, c. 5,) reciting "that great damages and losses have happened in divers parts of the realm, as well by reason of the outrageous flow-

ing, surges, and course of the sea, in and upon marsh-grounds &c. heretofore won and made profitable, as also by occasion of land-waters and other outrageous springs, in and

Under Somerset House there are drains and sewers, originally made by the authority of His Majesty's Board of

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upon meadows, pastures, and other low grounds, adjoining to rivers, floods, and other watercourses, and over that by and through mills, mill-dams, weirs, fish-garths, kedells, gores, gotes, floodgates, locks, and other impediments in and upon the same rivers and watercourses," authorizes (sect. 1) the directing of commissions of sewers in all parts of the kingdom, from time to time, where and when need shall require, according to the form given in sect. 3 of the act. Commissioners are to be assigned to be justices to survey the walls, streams, ditches, banks, gutters, sewers, gotes, calcies, bridges, trenches, mills, mill-dams, floodgates, ponds, locks, hebbing-weirs, and other impediments, lets, and annoyances, and the same to cause to be made, corrected, repaired, amended, put down, or reformed, as the case shall require, at their discretions;—and also to depute and assign keepers, bailiffs, surveyors, collectors, expeditors, and other officers, for the safety, conservation, reparation, reformation, and making of the premises, and to hear the account of the collectors and other ministers of and for the receipt, and laying out of the money that shall be levied and paid in and about the making &c. of the said sewers &c., to distrain for the arrearages of every such collection, tax and assess, as often as shall be expedient, or otherwise to punish the debtors and detainers of the same by fines &c."

Sect. 9 provides, "that the same laws, ordinances, and decrees, to be made and ordained by the said commissioners, or six of them, by authority of the said commission, shall bind as well *the lands, tenements, and hereditaments of the king, our sovereign lord, as all and every other person and persons*, and their heirs, for such their interest as they shall fortune to have or may have in any lands, tenements, or hereditaments, or other casual profit, advantage, or commodity, whatsoever they be, whereunto the said laws, ordinances and decrees shall in anywise extend, according to the true purport, meaning, and intent of the same laws."

(b) And by 3 & 4 Edw. 6, c. 8, it is enacted, that the act of 23 Hen. 8 shall continue in force, to be observed and kept for ever, in such manner and form as shall and may stand with the sequel and additions thereinafter mentioned.

Sect. 2 enacts, "that all sums of money thereafter to be rated and taxed by virtue of such commission of sewers, upon any of the lands, tenements, or hereditaments of the king, his heirs or successors, for any manner of thing or things concerning the articles of the said commission of sewers, shall be gathered and levied by distress or otherwise, in like manner and form as shall or may be done in the lauds &c. of any other person. And that all bills of acquittance, signed with the hand or hands of such collector or receiver as shall

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Works, and at the public expense, which drains and sewers are still under the management and control of the Board, and are cleansed, repaired, and maintained at public expense. The drains and sewers under the wing of Somerset House communicate with the ab drains and sewers, and form part thereof, and are within the city of London, and fall into the River Thames.

The case then set out the 3 Jac. 1, c. 14 (a), and 2 Will. & Mary, sess. 2, c. 8, s. 14 (b).

have the collection thereof, by the appointment of the said commissioners, or six of them, shall be as well a sufficient discharge to the tenants, farmers, and occupiers of the same grounds, so to be charged for the said sum wherewith their grounds shall be so charged, as also sufficient warrant to all and every the receivers, auditors, and other whatsoever officer or officers of our said sovereign lord the king, his heirs and successors, for the allowance to such tenant, farmer, or occupier, for the same."

(a) Whereby it is enacted, (sect. 2.) "that the walls, ditches, banks, gutters, sewers, gotes, causeys, bridges, streams and water-courses, within the limits of two miles of and from the city of London, which waters have their course and fall into the river of Thames, shall from henceforth be, to all intents, constructions and purposes, as fully subject to the commission of sewers, and to all the statutes made for sewers, and to all penalties in the same statutes, and in every of them contained, as if the same places near to the said city of London had been particularly named in the said statute of sewers, or that therein the water

had ebbed and flowed, and their free passage with boats and barges to the sea had been heretofore used.

(b) Whereby it is enacted "that all *new sewers* at any time since 12 Car. 2, made in any the said parishes, (within the city and liberty of Westminster, and certain other parishes,) shall henceforth subject to the commission of sewers, and to the laws and statutes made for sewers, fully to all intents and purposes as if such sewers, *sinks and vaults* had been expressly mentioned in the said statutes of sewers, to under the survey of the said commissioners; and the commission of sewers for the time being, within the limits of their respective commission, shall have power and authority, by virtue of this act, to alter, amend, cleanse, and construct such new sewers, *sinks and vaults* and to order and direct the making of any other new vaults and sewers and to cut into any drain or sewer already made, and to alter and take away any nuisances in the same, and to alter or take away any cross gutter or channels in or any of the streets or lanes in the parishes aforesaid."

By 47 *Geo.* 3, sess. 1, c. vii. after reciting the above acts of *James* and 1 & 2 *Will. & Mary*, it is enacted, "that all sewers, west of the city of London, extending to and including a certain watercourse, part of which divides the parishes of Chelsea and Fulham, and including the several parishes within the city and liberty of Westminster, and the precincts of the same, west of and extending to Temple Bar, and also including certain other parishes out of the city and liberty of Westminster, and all sewers and drains communicating with the same watercourses, or with any of the ancient sewers comprised within the limits prescribed by the act of 3 *Jac.* 1, or with any of the sewers mentioned or comprised in the said act of 2 *W. & M.*, which sewers and waters have their course and fall into the River Thames, shall from henceforth be, to all intents, constructions and purposes, as fully subject to the commission of sewers for the city and liberty of Westminster, and part of the county of Middlesex, and to all the statutes made for sewers, and to all penalties and provisions in the same statutes, and in every of them contained; and that the same commissioners and their officers, and all persons acting by their authority, shall have the same powers, authorities, remedies, jurisdiction, &c., as if the said several parishes had been particularly named and described in the several statutes of sewers, or that therein the water had ebbed and flowed, and therein free passage with boats and barges to the sea had been theretofore used."

There is a common sewer running through the square at Somerset House and running under Somerset House, which was made and is cleansed, repaired and maintained, by the commissioners of sewers for the city and liberty of Westminster; but the drains and sewers under the *eastern wing aforesaid* do not communicate therewith, nor do any of the drains and sewers stated above to have been made, and to be still cleansed, repaired and maintained by, and to be under the management and control of, His Majesty's Board

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of Works, so that the buildings of Somerset House derive no immediate benefit from the said drain or sewer of the commissioners of sewers, except the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed.

The office of the commissioners for auditing public accounts has not heretofore been rated to any sewers-rates, nor has nor have any person or persons, till the rate hereinafter mentioned, been rated in respect thereof.

The commissioners of sewers made a rate in which the plaintiff is rated, in respect of the audit office, in the several sums of 11*l.* 11*s.* 6*d.* and 2*l.* 12*s.*, upon a rental of 463*l.* and 104*l.*

By 52 Geo. 3, c. xlviii. s. 7, after reciting that great difficulty had arisen to the commissioners of sewers for the limits aforesaid, in laying an equal rate from time to time upon the several inhabitants within the limits of the said commissioners, occasioned by their not being authorized, under any of the statutes now in force concerning sewers, to call for and inspect the poor-rates of the several parishes within the limits aforesaid, it is enacted, "that it shall be lawful for the said commissioners of sewers, for the limits aforesaid, from time to time, as the said commissioners shall see occasion, by an order in writing, to direct the clerk for the time being of the said commissioners, or any other person on their behalf, to inspect or take a copy of the last rate or assessment for the relief of the poor of any parish or parishes within the jurisdiction of the said commissioners of sewers, and on production of such order by the clerk of the said commissioners, or other person as aforesaid, to the person entrusted with the custody of the several rates aforesaid, such person shall produce the same forthwith to the said clerk, and permit him to inspect and take a copy thereof from time to time, or otherwise shall furnish, with all convenient speed, to the clerk of the said commissioners for the time being, a true copy of the book of rates of such

parish or parishes as aforesaid, in order to enable the said commissioners of sewers to lay an equal rate or assessment on the several inhabitants within the limits of the said commissioners, or any portion thereof."

The commissioners of sewers, by the last-above-recited act, inspected the rate-books of the said parish of Saint Mary-le-Strand, and the plaintiff is therein rated for the relief of the poor of the said parish, in respect of the said premises, at the *yearly rental before mentioned*.

The several sums of 11*l.* 11*s.* 6*d.* and 2*l.* 12*s.*, assessed by the commissioners of sewers as aforesaid, were duly demanded of the plaintiff, and he thereupon refused to pay the same, whereupon by a warrant under the hands and seals of six of the commissioners of sewers for the city and liberty of Westminster, directed to the defendant, he was authorized and required to levy by distress and sale of the goods of the several persons mentioned in a certain schedule annexed to the said warrant, or of any other occupiers of the premises mentioned in the said schedule, opposite to their respective names, the several and respective sums placed against their names in the said schedule, being so much taxed or assessed upon the said premises, for and towards cleansing, repairing, or maintaining certain common sewers, within the district called the Eastern Division of the Westminster Sewers.

Under the authority of the said warrant, the defendant took and distreined the table mentioned in the declaration, which, at the time of taking thereof, was in the possession of the plaintiff.

By 7 Ann. c. 10, s. 3, it is enacted and declared, "that it shall and may be lawful to and for the commissioners of sewers, or any six or more of them, by warrant under their hands and seals, to give authority to any person or persons to levy the sums of money by them from time to time to be assessed or taxed, upon the lands, meadows, marshes, or grounds, liable or chargeable with any sesses, taxes,

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imposition or charges, by authority of the commission, by distress and sale of the goods of such person or persons that shall not pay, or shall refuse to pay the same.

If upon this statement of facts the Court shall be of opinion that the offices of the said commissioners for auditing the public accounts are liable to be assessed to the said rate, and that the said commissioners, or the plaintiff, are or is liable to be assessed thereto, as the occupiers or occupier of the said office, then the judgment is to be entered for the defendant, otherwise for the plaintiff.

This case was argued in Hilary term, 1835, by *Rogers*, for the plaintiff, who cited the following authorities. The case of *The Isle of Ely* (a), *Rooke's case* (b), *Cullis's Reading on the Statute of Sewers* (c), *Stafford v. Hamston* (d), *Dore v. Gray* (e), *Masters v. Scroggs* (f), *Rex v. Commissioners of Sewers for the Tower Hamlets* (g), *Netherton v. Ward* (h), *Holford v. Copeland* (i).

Blackburn argued for the defendant.

The arguments have been omitted, as they are fully noticed in the judgment of the Court.

Lord DENMAN, C. J., in the course of this term, delivered the judgment of the Court, as follows :

This was an action of trespass, for the purpose of trying the validity of a sewers-rate, imposed on the plaintiff as occupier of the audit office, in the eastern wing of Somerset House. The plaintiff contended that such rate was improperly imposed on him as occupier, even if it could be imposed at all in respect of that liability, but *that* also he

(a) 10 Co. Rep. 141.

(b) 5 Co. Rep. 99, 100.

(c) P. 121, ed. 1810.

(d) 2 Bro. & Bingh. 691.

(e) 2 T. R. 358.

(f) 3 Maule & Selw. 447.

(g) 4 Mann. & Ryl. 365; S. C. 9 Barn. & Cressw. 517.

(h) 3 Barn. & Alders. 21.

(i) 3 Bos. & Pall. 129.

denied. A case was agreed upon, stating the particulars from which the plaintiff's occupation was inferred by the defendant. On the effect of them we do not find it necessary to give any opinion, because the 52 Geo. 3, gives the power to rate those persons as occupiers, who are de facto assessed to the poor-rate, and the plaintiff filling the latter character with respect to the premises, is clothed with the former by the statute referred to.

We are therefore to decide whether the occupier of the audit office is liable to be rated to the sewers in respect of that occupation. The facts on this point were these—that under Somerset House are drains and sewers, originally made by, and still under the management and control of, the Board of Works, at the public expense; that the drains and sewers under the eastern wing communicate with these and form part thereof; that they are west of London, and fall into the Thames; that there is a common sewer running through the square of Somerset House, and under Somerset House, which was made and is repaired by the commissioners of sewers for Westminster, but the drains and sewers under the eastern wing do not communicate therewith, nor do the buildings of Somerset House derive any immediate benefit therefrom, except the general benefit and advantage of being accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.

Though numerous cases were cited in the argument from *The Isle of Ely case* to *Rex v. Commissioners of Tower Hamlets*, the doctrine laid down in them all is uniform and undisputed, as applicable to the present question. It rests on the principle that every one whose property *derives benefit* from the works of the commission, may be assessed to the rates they impose. The benefit is not required to be *immediate*, nor do the cases, or the commission itself, or the statutes, say any thing of the nature or amount of the benefit. Possibly that benefit may be so extremely small, that a jury

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would not have found the fact stated in the case. But on the other hand, the kind of benefit may be of high value; as if a house were inaccessible because surrounded by marshes, and the works of sewage had made those marshes hard and passable. The case does not even state that the amount of rate does not bear a just proportion to the extent of benefit. This may possibly be immaterial; for if the commissioners have *jurisdiction*, this Court will not, in an action of trespass for levying the rates, inquire whether they have correctly exercised their judgment. But as the jurisdiction results from the fact of benefit being derived, and the case expressly states that some benefit was derived, we think ourselves bound by the statement to say, that the defendant had authority to levy the rate, and that he is consequently entitled to our judgment.

Judgment for the defendant.

W. TRIMINGHAM v. G. TRIMINGHAM.

Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission.

ALL matters in difference between these parties having been referred to two arbitrators, they awarded that 723*l.* 6*s.* was due from *G. T.* to *W. T.*, and directed that general releases should be executed by both parties. A portion of the sum awarded being unpaid, and an additional sum having become due from *G. T.* to *W. T.*, the present action was brought, and all matters in difference between them were referred to *Simpson*, one of the former arbitrators. *Simpson* entered into a claim which had existed at the time of the former submission, and awarded partly in respect of that claim. Upon affidavits stating the above facts, *Cresswell* obtained a rule to set aside the award, on the ground that the arbitrator had gone into matters decided upon by the former award, and which he could not lawfully re-open.

Simpson, who made an affidavit in answer, stated that he had not, upon the second reference, entered into any matter before decided upon or before discussed. The other arbitrator (under the first submission) also made an affidavit, confirming that of *Simpson*.

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Campbell, A. G., in shewing cause, referred to and relied on the affidavits in answer.

Cresswell, contra. The affidavits are artfully framed to evade the real question before the Court. [*Patteson*, J. All that the deponents swear is, that the items were not gone into upon the former reference, not that they might not have been gone into.] The first award orders general releases. Every thing, therefore, which might have been gone into under that reference, must be taken to have been decided on; *Wharton v. King* (a), *Birks v. Trippet* (b).

LORD DENMAN, C. J. (stopping *Cresswell*).—It is perfectly plain, that where general releases are awarded, it must be taken that the whole accounts (c) between the parties are settled.

Rule absolute.

(a) 1 Mood. & Rob. 96.

(b) 1 Saund. 28 c.

(c) i. e. up to the time of the submission, not to the date of the award; vide *Samson v. Pitt*, Cro. Eliz. 432; *Webb v. Ingram*, Cro. Jac. 663; *Alabaster v. Clifford*, 1 Roll. Abr. 244, translated 3 Vin. Abr. 45, pl. 23; S. C. per nomen *Allaboyter v. Clifford*, Hutton 29;

Robinet v. Cobb, 3 Lev. 168; *Nicholas v. Chapman*, 3 Lev. 344, 361; *Simon v. Gavil*, 1 Salk. 74; S. C. per nomen *Squire v. Grevil*, 6 Mod. 34; S. C. per nomen *Sytre v. Grevett*, 2 Lord Raym. 984; *Pickering v. Watson*, 2 W. Bla. 1117; *Perry v. Nicholson*, 1 Barr. 278; *Doe d. Williams v. Richardson*, 3 Taunt. 697.

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A rule nisi to set aside an award, ought to state specifically the particular grounds of objection.

It is not sufficient to state that the arbitrator has exceeded his authority,—or that the award is uncertain and not final.

Where, by an agreement of reference, after reciting various disputes and claims by A. and B. (the parties to the agreement,) and that an action of trespass has been commenced by A. against B., “the afore-

said matters” are referred to C., and it is agreed that all the costs shall abide the event of the award, C. cannot make any award as to the costs.

And unless C. decides all the matters referred to him in favour of one party, the plaintiff and defendant must pay their own respective costs,—even though the arbitrator decides that the defendant has committed a trespass on the plaintiff's land.

By an agreement of reference between A. and B., which stated that A. claimed a yard and a pump therein as his exclusive property, but that B. had, after notice not to do so, entered the yard and taken water from the pump, and that there was a hedge and ditch dividing the lands of A. and B., which A. alleged that B. had removed into his (A.'s) land, all matters in difference were referred to C., who was further empowered to direct how, and by whom, and in what manner, the yard and pump, and hedge and ditch, should thereafter be enjoyed and occupied, and who should have the care and management thereof. C. awarded that the yard and pump were the sole and exclusive property of A., except that B. had a right to take water from the pump, and to have ingress and egress to and from the yard for that purpose; and further, that the pump should thereafter be considered as belonging to A. and B. jointly, and to be repaired at their joint expense; and that B. had not removed the hedge and ditch into A.'s land, but that thereafter the hedge should be kept in repair by B., who for that purpose should be at liberty to take mud from the ditch, but that subject to such privilege the ditch should thereafter be considered as the exclusive property of A.: Held, that the direction as to the future enjoyment, &c. is not inconsistent with the other part of the award; and held, that the arbitrator had not exceeded his authority by such direction.

TRESPASS *quare clausum fregit*. Before declaration the parties entered into an agreement to refer, (afterwards made a rule of Court,) which recited that they were owners and occupiers of adjoining houses; that between the two houses there is a yard, in which there is a pump; that the plaintiff had lately put a chain round the pump, and locked it up; that the chain had been broken and water taken from the pump by the defendant, after notice not to do so, and not to go to the pump; that at the end of the yard there was a crooked hedge and ditch dividing the lands of the plaintiff and defendant, which the defendant had removed more into the plaintiff's land than it formerly stood; that the defendant had built a wall across the yard; that the plaintiff alleged that the defendant had lately erected another wall upon part of the yard, in a line with the defendant's house at the lower end of the yard, which wall the plaintiff had thrown down; that the defendant had injured a foundation-stone of plaintiff's house, by placing thereon a door-post at the entrance of the yard, and had locked up the door there; that the plaintiff alleged that he was possessed

of or entitled to the yard, pump, and land on which the wall was erected, as his exclusive property, and had a right to free ingress and egress into and out of the yard; that the defendant had no right to injure the foundation of plaintiff's house, to make the wall across the yard, or to erect the wall so begun to be erected by him, or to break the chain placed round the pump, or to take water from the same after such notice to lock up the door at the entrance of the passage, or to remove the crooked hedge as aforesaid; that the defendant contended that he had not trespassed on the land of the plaintiff, and that the plaintiff had no just grounds of complaint against him; that this action of trespass had been commenced, and an appearance entered, but no declaration filed; and that the parties had agreed to refer all the said matters to the award of *T. L. Longueville*;—the parties then agreed to submit themselves to the award of *Longueville*, of and concerning the premises in dispute as aforesaid, and all other matters in controversy between the parties; and that *Longueville* should have power to state in his award *how, and by whom, and in what manner, the yard, pump, and doorway, hedge and ditch, should thereafter be enjoyed and occupied, and who should have the care and management thereof*, and that he should, at the request of the parties, or either of them, in his award state, and separately adjudicate upon each complaint, trespass, or claim made or brought, and state whether he allowed or disallowed the same, and under what circumstances, and upon what terms; and also that the costs and charges of the action, and of the submission and award, and all other matters in anywise relating thereto, *should abide the event of the award*.

Longueville, by his award, after reciting that the plaintiff had required him to adjudicate separately on each complaint, ordered that all proceedings in the action should cease, and determined that the defendant had injured the foundation-stone of the plaintiff's house by putting the door-post thereon; that the plaintiff is possessed of, and

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entitled to the yard and pump, and also the land on which the said wall, at the lower end of the said yard, had been lately erected by the defendant, in a line with his present house, as the plaintiff's *exclusive property, except that the defendant has a right to water from the pump in common with the plaintiff*, and of ingress and egress into and out of the yard, for the purpose of fetching such water therefrom; that the plaintiff has a right to free ingress and egress into and out of the said yard; that the defendant had no right to injure the foundation of the plaintiff's house, or to make the wall across the yard, or to lock up the door at the entrance of the yard. Therefore the arbitrator awarded that the defendant had committed a trespass on the plaintiff's land, in respect of the several matters last specified, but he adjudged that the defendant had *not* removed the crooked hedge into, or nearer than formerly to, the plaintiff's land, and that the defendant *had* a right to break the chain, and to take water from the pump. And in execution of the powers given to him by the agreement, the arbitrator awarded that the pump *should thereafter be considered as belonging jointly (a) to the plaintiff and the defendant, and he repaired at their joint expense*, and the defendant should have free ingress and egress into and out of the yard for the purpose of fetching and carrying away water therefrom; and that the boundaries between the respective properties of the plaintiff and defendant should remain as they then were, and that the defendant should not be interrupted in the use of the wall then lately erected at the lower end of the yard, and in a line with his house, but that the water and the land, whereon it stands, should be *considered as his exclusive property*; and that with the exception lastly thereinbefore mentioned, the yard and doorway should be enjoyed by the plaintiff as his exclusive freehold, and that the hedge should be kept in repair by the defendant, who should be at liberty *to make use of the*

(a) *Vide post.*

mud in the ditch adjoining, for the purpose of repairing the hedge bank, but not further or otherwise; and that subject to the exercise of such privilege, the ditch should be considered as the property of the plaintiff, who should be at liberty to carry away the mud therefrom as he should think proper. And further, that the arbitrator's costs of the reference, amounting to 12l. 3s. 10d., should be paid by the defendant, and that all the costs and charges of the action and agreement of reference, and all other matters relating thereto, all which costs and charges were by the said agreement directed to abide the event of the award, to be taxed as between party and party, should also be paid by the defendant to the plaintiff.

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Upon an affidavit which merely verified and set out the above submission and award,

R. V. Richards, in last Michaelmas term, obtained a rule calling upon the plaintiff to shew cause why the award should not be set aside, on the grounds as stated in the rule nisi (a), that the arbitrator has *exceeded his authority*, that the award is *uncertain and not final*, that the arbitrator has awarded that the pump was to be *considered as belonging to the plaintiff and defendant jointly* (b); and that he has also awarded that the pump is the *property of the plaintiff*; and also for that the arbitrator has not awarded, in pursuance of the submission, the payment of the *costs of the action*.

Sir *W. Follett* and *Wightman* now shewed cause. It seems to be objected that there is an inconsistency in the award as regards the *pump*. There is nothing inconsistent in the finding that the pump was, at the time of the sub-

(a) Pursuant to Rule Trin. 2 Geo. 4, which requires that where a rule to shew cause is obtained to set aside an award, the several objections thereto intended to be

insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

(b) *Supra*.

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mission and award, the sole and exclusive property of the plaintiff, and directing that in future it shall be considered as the joint property of both the plaintiff and the defendant. One objection to the award is, that the arbitrator has *exceeded his authority*, though in what respect he has done so is not suggested, and cannot easily be discovered. If it is meant to be contended that the arbitrator has exceeded his authority, by awarding as he has done respecting the future use of the pump, it is answered that the submission gives an express authority to award "how and in what manner, and by whom the pump, &c. shall in future be enjoyed and occupied." [*Patteson, J.* The arbitrator had power to direct the mode of *future enjoyment*, but has he a right to make any direction with respect to the *future property* in the pump? If what he says amounts to a direction of a *conveyance*, he has exceeded his authority.] The award only says that the pump shall in future be *considered* as belonging to the two jointly, and be repaired at their joint expense. This is not an attempt to change the property, but is only a direction that the pump shall in future be *enjoyed* and *repaired* by both jointly. [*Lord Denman, C. J.* I much doubt whether it is not a good objection to this rule for setting aside the award, that the description given of the grounds of objection is too general. It would seem to be large enough to include almost every possible objection.] The object of the Rule of Court of E. T. 1821(a), was to enable the party who is interested in supporting the award, to come prepared to meet the objections. The statement in this rule, of the grounds of objection, is not calculated to effectuate that object, and did not in fact effectuate it, for the plaintiff's counsel are still in the dark as to what objections are intended to be advanced. Suppose in the case of an application to set aside an annuity deed, it had been stated in the rule as the ground of objection, that the parties *had not complied with the directions of the Annuity Act*, such a statement would not have been

(a) *Supra*, 791 (a).

sufficient. If the present statement of the grounds of objections is sanctioned, the rule of Court will be of no avail.

The arbitrator was warranted in awarding as he has done, with respect to costs. The award is in favour of the plaintiff,—that he has the sole property in the soil &c., except that the defendant has a right to the use of the pump to take water from it, and an easement over the land for ingress and egress; and that the defendant has committed trespasses on the plaintiff's land. Therefore the arbitrator has awarded the costs according to the event of the award.

R. V. Richards, contra. This rule, as regards the statement of the grounds of objection, is framed agreeably to the usual practice. It may be expedient to *make* a rule of Court which shall be more explicit, but it is sufficient for the present applicant to have acted upon the existing rule, as it is understood in practice. In quo warranto, it is usual to state as the ground of objection, that the party is *not duly elected*, which is full as general as the statement here; *Rosser v. Arnold*. With respect to the costs:—The arbitrator had no authority to award that the defendant should pay the costs. They were directed by the reference to *abide the event of the award*; and it is impossible to say that this award is in favour of either party, for the arbitrator has determined some of the questions in dispute in favour of *each* party. This was not a reference of the action, but of all differences. [Lord Denman, C. J. We think that it is impossible to say in whose favour the award is. This will affect the direction as to the costs, but no other part of the award.] The arbitrator has exceeded his authority by, in effect, constituting the plaintiff and defendant *joint-tenants* (a) of the pump, and by throwing upon

(a) The direction that the pump should be considered as belonging *jointly* to the parties, does not appear to suppose the existence or

to require the creation of a *joint tenancy*. Tenants in common and parceners are said to have a *joint* seisin.

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the defendant a *liability to repair* it; and he has exceeded his authority by requiring the defendant to *repair the whole of the hedge*, and in authorizing the defendant to *take the mud of the ditch*, which is part of the plaintiff's soil and freehold, for the purpose of repairing the hedge.

He also argued that the award is uncertain and not final.

LORD DENMAN, C. J.—It appears to me that this rule must be discharged. The objections stated on the rule are, that the arbitrator has *exceeded his authority*; that the award is *uncertain and not final*; that the arbitrator has awarded that the pump shall be considered as belonging to the plaintiff and defendant jointly, and has also awarded that the pump belongs to and is the property of the plaintiff; and then follows the objection as to the awarding of costs, upon which we have already expressed our opinion. Upon this rule nothing is open to be argued, except the objections which are stated in it. Even supposing that under general words, such as are here used, the Court might consider any particular complaint ranging itself under the general words, yet when, as here, they are followed by a particular complaint, I must say that I think the general complaint is narrowed. The meaning of the rule of E. T. 1821, was, not that the party should state the mere *heads* of objection, but that the *particular* objections should be specifically pointed out. The case to which allusion has been made, is inconsistent with the rule. Under this rule, the party coming to oppose it may have had no notion of the particular objections intended to be taken. Supposing, however, that we *could* consider the objections which have been made to-day, I do not think that they are good.

LITLEDALE, J.—The costs are directed to abide the *event* of the award, and therefore the liability to pay the costs can be determined only by looking to see *in whose*

favour the award is made. I think that the arbitrator had no power to direct that the defendant should pay the costs. It is objected that the arbitrator has exceeded his authority, and that the award is not certain or final. I do not think that this is so. Then with regard to the particular complaint with respect to the pump:—I see nothing inconsistent in the two parts of the award, with respect to this pump, nor any thing that is not warranted by the submission. I also think the finding with respect to the mud in the ditch, is warranted by the submission. The rule must be absolute as to so much only as relates to the costs.

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PATTESON, J.—I am entirely of the same opinion. I thought at first that the rule ought to be entirely discharged, but now I quite agree that it must not be so as to the costs. There being many matters in difference which are referred, and it being directed that the costs shall abide the event of the award, it seems to follow that each party must pay his own costs, unless *all the matters in difference are decided in favour of one of them*. If the Court were to say that the arbitrator could award as to the costs, it would be giving him a power independent of the submission.

I hope it will not be taken that we consider the form in which some of the grounds of objection are stated, to be sufficient. *Rosser v. Arnold* is distinguishable. There the Court took notice of what the affidavits contained, on the ground that the contents of the affidavits were as well known to the party called upon to shew cause against the rule as the language of the rule itself, and that both must be taken together. Here, there is no statement upon the affidavits which might draw the attention of the opposite party to any particular objections. I hope that in future it will be understood, that when it is objected that the arbitrator has exceeded his authority, the rule must go on to state *in what way* the authority has been exceeded,—and so with regard to other general heads of objection.

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But supposing that it is open to us to inquire whether the arbitrator has exceeded his authority, I see no reason for holding that he has done so. The arbitrator is empowered to say *how* this pump &c. shall in future be enjoyed, and I think that the word "*how*" alone would give him power to say *who shall repair*. But there are also these words—"and who shall have the care and management thereof;" which words, together with the others, clearly give the right which has been exercised. That right follows of necessity, from the terms of the submission. The same observation holds as to the objection with respect to the mud of the ditch. I see no excess of authority.

COLERIDGE, J.—I am of the same opinion; and I would especially express my entire concurrence on what has been said with respect to the construction of the rule of Court. There can be no doubt as to what was the *object* of that rule; and we should be defeating that object if we allowed parties, under a general complaint of an excess of authority, to go into any objection which they say ranges itself under that general head. I hope this will be thoroughly understood in future. But in fact no excess of jurisdiction in this case has been shewn. The arbitrator might well give directions as to the repairs. He is to direct how and in what manner the pump shall be enjoyed, and who shall have the care and management thereof. Looking at the subject-matter of the reference, I think there is quite enough to support the award.

Rule discharged.



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DEBT, for arrears of a yearly salary payable quarterly, viz. on the 24th June, the 29th September, the 25th December, and the 25th March, for the plaintiff's services as clerk to the Company. Plea: *nunquam indebitati*. At the trial before Lord *Denman* at the sittings at Westminster, after last Trinity term, it appeared that on 10th June, 1830, by a resolution of the directors, the plaintiff was appointed clerk to the Company, at a salary of 200*l.* a year. This resolution was silent as to the *time* at which the salary was to be paid. In order to shew that the salary was payable quarterly, proof was given of quarterly payments up to the 25th of March, 1832. On the 17th April, 1832, the plaintiff was dismissed from his employment, and he sought in this action to recover his salary from the 25th of March up to the expiration of the then current year, on the ground that he was improperly dismissed. The dismissal of the plaintiff took place under the following circumstances. An application was made by the plaintiff to the directors, for compensation for services, which he alleged he had performed previously to his appointment as clerk. Before this request was considered, some disagreement took place between the plaintiff and the directors. The Company having completed the building of the market, were about to open it to the public, and, on the 29th of March, the plaintiff received a communication from the chairman of the court of directors, informing him that the directors present at several meetings had come to the conclusion that his habits were incompatible with the discharge of the increasing duties of clerk to the Company, and that it was therefore the duty of the directors to make a new appointment at this era of their establishment, when the active operations of the Company were about to commence. The plaintiff, after

A yearly servant dismissed upon sufficient cause, cannot recover wages, either for the whole of the current year, or pro rata in respect of the portion of the year during which the service continued, although the misconduct constituting the sufficient cause of dismissal was not the *motive* from which the dismissal proceeded.

After a general hiring at a yearly salary, payment and acceptance of the salary by quarterly payments is evidence of a subsequent contract to pay and receive quarterly.

Whether a yearly servant wrongfully dismissed during a current year, can maintain debt or *indebitatus assumpsit*, either for the entire year or pro rata, or whether his remedy is by action for the wrongful disturbance—*quare*.

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this communication, requested the court of directors to appoint a committee to inquire into his qualifications. This was refused. On the 11th of April, the directors ordered the plaintiff to enter the letter of the chairman to him, and to erase the statement in answer to that letter made by him, and to send out notices to summon a meeting of the directors on the 17th of April to appoint a clerk. The letter was accordingly entered by the plaintiff, *but he also added a protest against the proceedings of the directors.* On the 17th of April the plaintiff was formally dismissed from his employment, and another person appointed clerk to the Company. The Lord Chief Justice left the question to the jury whether the entry of the protest, by the plaintiff, in the books of the Company was a sufficient ground of dismissal. The jury were of opinion that it was, and found a verdict for the plaintiff for 12*l.* being a portion of the salary, from the 25th of March, when he was last paid, up to the 17th of April, when he was dismissed. In Michaelmas term last Sir *J. Scarlett*, in pursuance of leave given by the learned Chief Justice, obtained a rule nisi to set aside the verdict and enter a nonsuit, on two grounds:—

1. That there was a variance between the contract as laid and proved, as there was no proof that the salary was to be paid quarterly;—and
2. That as there was a good ground of dismissal, the plaintiff could not recover *pro ratâ*.

At the same time, *Follett*, in pursuance of leave likewise given, obtained a rule nisi, on the part of the plaintiff, to increase the damages to 150*l.*, which would be due to the plaintiff if he was entitled to recover for the current year. Against the rule nisi for a nonsuit,

First point:
Variance.

Sir *Wm. Follett*, and *John Henderson*, now shewed cause. There is no variance between the proof of the contract, and the statement of it in the declaration. The entry in the books proved that the plaintiff was appointed clerk to the Company at an annual salary. The receipts

of successive quarterly payments, which were put in, shewed that the salary was payable quarterly. In an ordinary case, the fact of a master's paying his servant quarterly, is considered evidence of an *agreement* to pay in that manner.

No clause in the Act incorporating the Company, requires the appointment of their clerk to be *in writing*.

Then as to the second point, viz. that as the jury have found that the directors had good ground to dismiss the plaintiff, he is therefore not entitled to any salary. It is not enough that the jury have found that the clerk was guilty of such misconduct as warranted his dismissal, they should have found, further, that he was dismissed *for* that misconduct. It was admitted at the trial that the plaintiff was not dismissed on account of the entry of the protest; and indeed the whole of the evidence shews that this was the case. By the letter of the 29th March, written before the protest was made, the plaintiff is informed that it was the intention of the directors to dismiss him, and the ground of dismissal was, that his habits rendered him unfit to perform the duties of the office under the altered circumstances of the Company. On the 11th of April he performed the duties of his office, and it was not until the 17th of April that another clerk was appointed.

The contract was a *yearly* contract, not determinable until the expiration of a year, without a sufficient ground *for dismissal*; *Beeston v. Collier*(a); *Spain v. Arnott*(b). If a clerk be hired for a year, and is dismissed on sufficient grounds within the year of service, he cannot recover any portion of his wages; *Turner v. Robinson*(c), *Gandell v. Pontigny*(d). It must follow as a necessary consequence from this proposition, that to deprive a clerk of his wages, not only must it be shewn that he is guilty of misconduct, but that he was dismissed *for* that misconduct; for

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Salary pro
rata.Third point:
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tract.

(a) 4 Bingham 309.

(b) 2 Stark. N. P. C. 356.

(c) *Ante*, vol. ii. 839.

(d) 4 Campbell 375.

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otherwise there would be no reciprocity:—After the servant had been guilty of misconduct the master might refrain from dismissing him until within a day of the expiration of the year, and thus deprive the servant of wages for services properly performed. After the servant has been guilty of misconduct, the contract is *voidable* and not *void*.

It may also be questionable whether the conduct of the plaintiff *was* of such a nature as to warrant his dismissal, and it may be contended that he was in fact dismissed by the letter of the 29th of March.

First point.

P. Kelly, contra. The defendants are entitled to have a nonsuit entered on the ground of variance. Every part of a contract, as alleged in the declaration, must be proved as laid: *Preston v. Butcher* (a). The contract, as alleged in the declaration, is a contract of a *hiring for a year*, at a salary payable *quarterly*. The contract proved was simply a contract for a year's service, at a salary of 200*l.* per annum. There was no proof that the salary was to be paid *quarterly*. It may be admitted that the contract with the plaintiff need not, to bind the defendants, be by *deed*; but the case has been argued as if the entry was not evidence of the contract. There is no stipulation in the entry that the salary shall be paid quarterly. [Lord *Denman*, C. J. There is nothing *exclusive* of such a stipulation. Why may not the directors have agreed by parol to pay the plaintiff his salary quarterly?] It is said that the *payments* are evidence that the contract was to pay the salary quarterly, but the entry in the books is in this case the evidence of the contract, and that entry does not provide that the salary shall be paid quarterly. [Coleridge, J. Suppose we knew nothing of the contract except by means of the payments, would not the payment of wages quarterly be evidence of a contract of hiring, and of the terms agreed upon for the payment of the wages? In this case the entry is evidence of the appointment as clerk at an annual salary, and the re-

(a) 1 Stark. N. P. C. 3.

ceipts of quarterly sums are evidence of the periods at which the salary was to be paid.]

The action is improperly brought. The plaintiff, if he was wrongfully dismissed, should have brought an action for such wrongful dismissal, and not the present action. In *Beeston v. Collyer* the form of action was special assumpsit by the clerk, for the breach of contract in putting an end to the employment before the end of the current year. *Turner v. Robinson* (a), and *Thomas v. Williams* (b), shew that a servant may have his action for damages sustained by reason of a wrongful dismissal. In many cases the action for wages would be an inadequate remedy; for in case of domestic servants, when they are improperly dismissed, they are unjustly deprived, not only of their wages, but also of their sustenance. [Lord Denman, C. J. Why may not the servant have an action for the damages he sustains by his wrongful dismissal, and also an action for his wages?] A dismissal for any cause operates as a dissolution of the relation of master and servant. If it be held that it does not, great inconvenience will follow. In the present case, if the relation of master and servant is not dissolved, the plaintiff has a right to enter upon the Company's premises and take away the books. Would it be convenient to try the question whether the plaintiff was properly dismissed, in an action of trespass? [*Follett* interposed, and said that this objection was not taken at the trial.] If the defendants are not permitted to take this objection now, at all events it is an answer to the rule nisi for increasing the damages.

There is no authority for the position contended for on the other side, viz. that to warrant a dismissal, not only must there be misconduct, but the *motive* of the master for dismissing the servant must be—that particular misconduct. It is sufficient that the servant *has* been guilty of misconduct; and it is well established, that if a servant be properly dismissed during the current year, he cannot recover

(a) *Ante*, ii. 839.

(b) *Ante*, iii. 545.

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Third point.

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pro ratâ. *Hulle v. Heightman* (a), *Fawcett v. Cash* (b). The plaintiff, therefore, ought to have been nonsuited. [Coleridge, J. Suppose I dismiss a servant without a cause to-day, and to-morrow I find out he has stolen my plate, would that warrant his dismissal?] The servant could not maintain an action for his wages.

Lord DENMAN, C. J.—This is an action brought by the plaintiff against the Hungerford Market Company for three quarters of a year's wages, due to him as servant to the Company. A verdict was found for the plaintiff. Two rules have been obtained. One rule for a nonsuit, on the ground, first, that the contract was not proved as laid; secondly, that the plaintiff had been properly dismissed from the service of the Company, and could not recover any wages pro ratâ. On the other hand, the plaintiff has obtained a rule to increase the damages to the sum which would have been due to him at the end of the current year. The rule nisi for a nonsuit must, in my opinion, be made absolute. There was, I think, no variance between the proof and the contract laid in the declaration. It was consistent with the minute of the appointment of the plaintiff, as clerk to the Company at an *annual* salary, that he might have subsequently insisted on *quarterly* payments, and that the directors might have agreed to that mode of payment. It is not, however, necessary to decide that point; nor is it necessary to determine the question, whether a servant improperly dismissed can recover his wages pro ratâ. Numerous cases have decided, that if a party who is hired for a particular period thinks proper so to conduct himself that he is not able to give his skill and his services for the whole of that period, he shall not recover his wages pro ratâ in respect of the period during which he has actually rendered his services. It is not, in my opinion, necessary that a master, having good ground for dismissal, should either

(a) 2 East, 145.

(b) *Ante*, iii. 177.

state that ground, or be *actuated* by it in dismissing his servant. It is sufficient that the master *has* a justifiable cause for dismissing his servant. Suppose a master intended to dismiss his servant without sufficient cause, and the servant learning this, grossly insults his master, surely this would entitle the master to dismiss the servant. It is unnecessary to consider the case where the master has not good ground of dismissal, as in this case the jury have found that the masters were justified in dismissing the servant. The question here is, whether the absence of proof connecting the dismissal with the misconduct of the servant, entitles him to maintain an action for his wages. I am of opinion that it is sufficient for the master to shew that a ground for dismissal *exists*. The plaintiff, therefore, can recover no damages, and the rule for a nonsuit should, in my opinion, be made absolute.

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LITLEDALE, J.—The plaintiff is not, in my opinion, in a situation to recover any thing. The question was left to the jury, whether the entry of the protest in the books of the Company was a sufficient cause of dismissal, and they have found that it was. There being sufficient ground for dismissing the plaintiff, it has been argued that if the plaintiff was not dismissed for that cause, but for another, he is entitled to maintain this action, and to recover the whole of his wages. In point of law that is not so. It is sufficient for the master, that a proper cause *exists* at the time when the dismissal takes place. This may be compared to an action of assault and false imprisonment, to which there is a plea of justification, by virtue of a warrant, and a replication of *de injuriâ*. If the defendant had a good warrant at the time when he made the arrest, he may justify under the good warrant, although in fact he did not intend to arrest on that warrant (*a*). The defence in this action may also be compared to a case where a party dis-

(*a*) Vide *Bennett v. Filkins*, 1 Wms. Saund. 20; and *The Governors of the Poor of Bristol v. Wait*, *ante*, iil. 359.

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trains for one cause and avows for another (a). In *Lucas and others v. Nockells* (b), this matter was much considered, and the *College of Physicians'* case (c) was confirmed, which decided that a party may abandon that which he may have stated as the cause of arrest, if he has sufficient ground at the time when the arrest is made. In this case, therefore, if sufficient cause existed at the period when the dismissal took place, the master is justified, although he did not in fact dismiss the servant on that ground.

It is not necessary to decide the question of variance; but I should have thought that proof given of quarterly payments was quite sufficient to authorize a jury to infer an agreement to pay quarterly.

PATTESON, J.—The rule for a nonsuit was moved on two grounds. The one, that there was a variance between the proof and the statement of the contract in the declaration; the other, that the plaintiff was properly dismissed from the service of the defendants, and could not recover pro rata for services actually performed. As to the first ground, I think there was no variance. Taking the whole of the evidence, it is clear there was a contract with the plaintiff for a salary of 200*l.* a-year, payable quarterly. It is however unnecessary to decide this point. As to the other ground, the jury have found that cause, sufficient to warrant the dismissal of the plaintiff, existed at the time of his dismissal. But it is said that the plaintiff was not dismissed on

(a) Acc. *Butler and Baker's* case, 3 Co. Rep. 36 b; *Gwinnett v. Phillips*, 3 T. R. 643. But where the plea in bar to a cognizance traverses that the defendant is bailiff, and it appears that he distrained in his own right, although the lord under whom he makes cognizance has adopted the distress, the issue must be found for the plaintiff. Per *Gascoyne*,

C. J. of K. B., H. 7 H. 4, fo. 34, pl. 1. And see H. 5 E. 2, Fitz. Abr. Estoppel, pl. 258; T. 10 E. 2, *ibid.* pl. 213; T. 20 E. 3, Fitz. Abr. Avowry, pl. 130; 1 Leon. 50; 7 T. R. 654; 1 East, 142.

(b) 10 Bingh. 729; 3 Moore & Scott, 627.

(c) *Dr. Groenvelt v. Dr. Barwell*, 1 Lord Raym. 454.

that ground. Neither the Court nor a jury can inquire into the master's *motive* for dismissing his servant. If the master has good *ground* for dismissing his servant, he may assign that as his reason, when an action is brought against him by the servant. If a master *dislikes* his servant, he may dismiss him for an *offence*, for which he would not have dismissed him if he had not entertained a dislike to him. It was argued at one time, as if the cause of dismissal arose *after* the dismissal had actually taken place. If that had been so it would have been competent to the plaintiff to maintain this action. But on the 11th of April, the directors send out notices that another court will be held to appoint a clerk. Whom do they employ to send out these notices? This very plaintiff. He sends out the notices, and makes an entry in the books of the Company, protesting against the appointment of another clerk, on the ground that he is competent to perform the duties of the office, and desirous of performing them. It is manifest that at that time he was clerk to the Company. By making the entry he gave the Company an advantage, of which they might avail themselves. If we did not hold that where cause exists for turning a servant away, the master has a right to set it up, whether or not the dismissal proceeded *on that ground*, what would be the consequence?—that where a master intended to dismiss a servant for an insufficient cause, the servant might safely be guilty of any misconduct he pleased. All that is necessary is, that the master should *have* sufficient cause previously to the dismissal.

COLERIDGE, J.—I am also of opinion that the rule for a nonsuit should be made absolute. Three reasons have been assigned to induce the Court to pursue this course.

First, it is said that there is a variance between the proof and the contract, as laid in the declaration. That ground has failed. There are abundance of materials to presume that the salary was to be paid quarterly.

The second reason assigned for the granting of a new

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trial was, that the action was misconceived. If it had been necessary to decide this question, I should have wished to have taken time to consider of it. In *Orchard v. Horner*(a), Lord *Tenterden* appears to have thought that a servant improperly dismissed, could recover on a count for wages *pro rata*. If, however, the third ground for making the rule absolute is tenable, it is immaterial to consider that point.

It is settled that if sufficient cause be given for turning away a yearly servant, in the middle of the current year, and he is dismissed, he cannot recover his wages *pro rata*. In this case no attempt is made to disturb the finding of the jury. In truth, the conduct of the plaintiff was wholly inconsistent with the relation of master and servant. But it is argued, that in order to entitle the defendant to set up this defence to the action, the jury, in addition to the finding that there had been misconduct on the part of the plaintiff, should have gone on to find that he was dismissed on account of that misconduct. Upon consideration I think that this is not necessary. Where the servant has been dismissed, and the master is sued for wages, the master may avail himself of the misconduct of the servant as a defence, although he may not have dismissed him for that cause. The only question to be considered is, has the service been put an end to upon sufficient cause? That is an intelligible question. If the *motive* of the master is to be inquired into, the jury will have to consider a question very difficult to determine.

On that ground, in my opinion, the rule for a nonsuit should be made absolute.

Rule absolute for a nonsuit.

(a) 3 Carr. & Payne, 350.

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DOE on the demise of (Admiral) DOUGLAS and Wife v.

ELIZABETH LOCK.

EJECTMENT for messuages and lands at Porlock, in the county of Somerset, tried before *Alderson J.*, at the Bridgewater Assizes, 1831, when a verdict was taken for the plaintiff, subject to the following case:

21st February, 1765. *William Blathwayt* being seised in fee, devised the premises to *Mary* his wife for life, remainder to *William* his son, in fee.

May, 1787. The testator died seised, leaving his widow, *Mary Blathwayt*, him surviving.

December, 1827. *Mary Blathwayt* died, aged 107.

March, 1796. *William Blathwayt*, the son, devised his remainder to his wife *Frances* (one of the lessors of the plaintiff) for life; and *Frances*, after the death of *William*

A., tenant for life, is empowered to make leases, provided "the ancient and accustomed reservations be thereby reserved," and provided "they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements as

are usually and customarily contained in leases of the same kind in the respective parishes and places in which the premises are situate."

Upon a question as to the validity of a lease granted by *A.*, other leases of lands in the same parish are admissible in evidence for the purpose of shewing whether the lease in question satisfies the second proviso.

Semble, that the true criterion of a reservation of the ancient and accustomed rent under the first proviso is,—the reservations contained in the lease made of the premises next preceding the creation of the power.

Dubitatur, whether a *quarterly* reservation of rent, which had been previously reserved *half-yearly*, will vitiate the lease.

It is no objection to such a lease, that in former leases a right of re-entry was reserved, in the event of there being no *overt* distress on the premises, and that in the lease under the power the word "*overt*" is omitted.

The omission to reserve a heriot, where a heriot had been accustomedly reserved, would vitiate the lease.

But a reservation of a heriot of "the best good of the person or persons who for the time being shall be tenant or tenants in possession of the demised premises," is sufficient, though the reservation in former leases was, "of the best good of *A. B.* (the *cestui que vie* and lessee) or, such person as shall be in possession of the premises as tenant, by virtue of the lease."

A clause, purporting to *reserve* and *except* to the lessor the power of hunting, &c. over the demised premises, enures as a *grant* from the lessee to the lessor of a *right* or *privilege*, and not as a reservation or exception.

A clause in a lease, purporting to *reserve* underwoods and underground produce, enures, not as a reservation but as an exception.

Where former leases contained an exception of "all and all manner of timber trees, and trees likely to prove timber," a lease under such power, containing an exception of "all timber trees, *bodies* of pollard and other trees whatsoever," granted at the same rent, was held to be void,—on the ground that the *subject-matter* of the demise is increased by the alteration in the exception, and that no further rent is reserved in respect of such addition to the *subject-matter* of the demise.

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*Blathwayt*, the son, which happened in the year 1806, intermarried with Admiral *Douglas*, the other lessor of the plaintiff.

The defendant is the widow and executrix of *John Lock*, who was steward to *Mary Blathwayt*, and claims to hold the premises, or some part of them, under certain leases granted by *Mary Blathwayt* in execution, as the defendant contends, of a power of leasing contained in the will of *William Blathwayt* (the father), which, as far as the present question is concerned, was in the following terms:

"I give and devise unto my wife *Mary Blathwayt*, all that my manor or reputed manor of Porlock, and the several capital messuages, mansion houses, and other messuages and tenements, farms, lands, arable, meadow, and pasture, and wood grounds and hereditaments, with their and every of their appurtenances, situate &c. in the parish of Porlock, in the county of Somerset; and also all and singular &c.—(the will then describes property in the city of London and the parishes of Clerkenwell and St. Luke's, in the county of Middlesex,)—to hold to her and her assigns, from and immediately after my decease, for and during the term of her life, in lieu and in full recompense and bar of all dower &c.; and from and after the decease of my said wife, I give and devise all and singular my said manor, messuages, &c. to my eldest son and heir apparent, to hold to him, his heirs and assigns for ever: Provided always, and my will is, that my said wife shall have full power and authority, from time to time, during her life, to grant leases of my said houses and premises in and near London, for any term or number of years not exceeding 21 years, to commence and take place in possession and not in reversion, and also to demise and grant leases of all and every the estates and lands lying within my manor of Porlock, for the term of fourscore and nineteen years, determinable on one, two, or three lives, in possession, reversion, or remainder, or such part or parts thereof as now is or are, or hath or have been anciently demised and granted for one, two, or three lives, in possession or reversion, so as there be no more than three lives

in being at one time, and so as the ancient and accustomed yearly rent and reservations be thereby reserved; and also to demise and grant leases of all other my said farms, lands, and premises within the parish of Porlock, for any term or number of years not exceeding twenty-one years, whereon shall be reserved the utmost and most improved rent that can or may be had or gotten for the same, and without having, receiving, or taking any fine for doing thereof, and so as that the tenants or occupiers thereof be not dispunishable of waste; all and every such several leases of my said houses in or near London, of my estates at Porlock held for 99 years determinable on lives, and of my said farm, lands, and estates, being from time to time made and granted, in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the said premises are situated, and all and every the tenants and lessees from time to time executing counterparts of such leases."

By the first lease, under which the defendant claimed, dated 20th April, 1804, *Mary Blathwayt* demised to *John Lock* for 99 years, if three persons therein named should so long live,—one of whom is now alive.

By a second lease in reversion, dated 4th November, 1820, *Mary Blathwayt* demised unto the defendant, for the term of 99 years, immediately after the determination of the estate then subsisting therein, if three persons therein named should so long live,—one of whom is now alive.

The only old lease now existing of the premises in question, was one produced by the plaintiffs from the muniment room of the estate, bearing date 15th April, 1756.

By this lease certain reservations and exceptions were made which were not contained either in the lease of 1804 or in that of 1820. Thus, in the lease of 1756 the rent was reserved at two *half-yearly* payments, in those of 1804 and

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1820, at four *quarterly* payments. Again, the lease of 1756 contained a power of re-entry in case the rent should be in arrear *twenty-one* days, and there should be no *overt* distress upon the premises; but the leases of 1804 and 1820 gave the right of re-entry if the rent should be in arrear *twenty* days, and there should be no distress,—omitting the word “overt.” By the lease of 1756 a heriot was reserved of the best good of *W. Frost* (the lessee), *his executors, administrators or assigns, or of such person as should be in possession* of the premises, and entitled to the same by virtue of the lease. The lease of 1804 reserved a heriot of the best good of *J. Lock* (the lessee); and in the lease of 1820 it was of the best good of *the person or persons who for the time being, during the term, should be tenant or tenants in possession of the demised premises*. Again, the lease of 1756 contained an exception of all and all manner of timber trees, and trees likely to prove timber, then standing, or which during the term should stand, on the demised premises. The leases of 1804 and 1820 excepted all *timber trees, bodies of pollard and other trees whatsoever*, (“now or hereafter” in the lease of 1820,) standing or growing on the demised premises, with free liberty to the lessor, his heirs, &c., to cut and carry away the same. The lease of 1756 reserved right of egress and regress to take trees, quarries, mines, &c. The lease of 1804 did not reserve such right in respect of trees and quarries. The lease of 1756 reserved all mines and quarries of stone or slate. The lease of 1804 contained no reservation of quarries. The lease of 1820 was in this respect the same as that of 1756. The lease of 1756 contained a reservation of a *right to hunt, hawk, fish, or fowl*, upon the premises. The leases of 1804 and 1820 contained no such reservation, but reserved *all royalties*. The lease of 1756 reserved suit of mill to *the lord of the manor*. The other leases reserved it to the grantor, her heirs or assigns, or such person as should be *owner of the inheritance*. There were some other variations, which it is not necessary to mention.

For the plaintiff it is contended, that the lease of 1804 was invalid, inasmuch as it contained no reservation of the *shrouds, limbs, or tops*, but only of the *bodies* of young trees, not having arrived at that age or maturity to be considered timber-trees; nor of the shrouds, limbs, or tops of pollard trees; nor any young trees of the timber kind, such as oak, ash, and elm, but only a reservation of timber trees and the *bodies* of pollard trees, and the *bodies* of other trees; and no reservation even of any timber trees, bodies of pollard, or other trees themselves that should thereafter stand or grow upon the said demised premises; no reservation of any quarries of stone or slate, or of liberty to enter to take the same; no reservation of liberty to hunt, hawk, fish, or fowl upon the premises; no reservation of the rent *half-yearly*, but instead thereof *quarterly*; no reservation of the best good of the lessee, his executors, administrators, or assigns, or of such persons as should be in possession of the premises, and entitled to the same by virtue of the lease, for and in the name of a heriot; no reservation of a right of re-entry for the lessor, his heirs and assigns, in case the rent should be unpaid twenty-one days, and there should be no "overt" distress upon the premises whereby to levy the same, although the lease of 1756 did contain all these reservations.

And that the lease of 1820 was ineffectual and void, inasmuch as it contained no reservation of the shrouds, limbs, or tops, but only of the *bodies* of young trees not having arrived at that age or maturity to be considered timber trees; nor of the shrouds, limbs, or tops of pollard trees, nor of any young trees of the timber kind, such as oak, ash, and elm, but only a reservation of timber trees, and the bodies of pollard trees, and the bodies of other trees; no reservation of liberty to hawk, hunt, fish, or fowl; nor of the rent half-yearly, but instead thereof quarterly; no reservation of the best good of the said *Elizabeth Lock*, her executors, administrators, or assigns, for or in the name of a heriot; no reservation of right of re-entry for the lessor, his heirs or assigns, in case the rent should be unpaid *twenty-one* days

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and there should be no *overt* distress upon the premises whereby to levy the same, although the lease of 1756 did contain all these reservations.

The property of the lessors of the plaintiff in the parish of Porlock, consists of about 4000 acres. There are in the parish 500 acres the property of others, of which 100 or more belong to Lord King, and are commons; 100 acres of wood are Lord King's; some few acres are Sir Thomas Acland's; the rector has about 100 acres of wood, some common, and other lands; and there are a few other very small proprietors, of three or four acres each.

Reservations.

The defendant proposed to prove that the several leases were granted with such reservations, restrictions, covenants, conditions, and agreements as were usually and customarily contained in leases of the same kind, in the parish and place where the same were situated, and for this purpose tendered in evidence several leases granted by *William Blathwayt* of lands and tenements in Porlock. The learned judge was of opinion that the defendant was in this respect confined to former leases of the *same* property, but it is agreed that other leases of other lands within the same manor shall form part of this case, subject to the opinion of the Court on the admissibility of them in evidence; and the Court to be at liberty to draw any inference of fact which a jury might have done from the evidence hereinafter set out.

Trees.

As to the reservations relative to trees, &c. contained in the leases of 1804 and 1820, the defendant contends that there is no *usual* reservation in this respect in leases of the same kind in the same parish, for that the reservation, where it does occur, is in these thirteen varieties. (The case here gives the thirteen varieties of reservations as to timber trees, which varieties are collected from fifty-three leases, and many of them differ more widely from the reservation in the lease of 1756, than do the reservations in the lease of 1804 and 1820.) And that in the three next mentioned, and in nine others, at least, in that parish, there is not any reservation of timber at all. (The case here gives the



dates, names of the tenants, and description of the property in the three leases.)

As to there being no reservation of any quarries of stone or slate, or of liberty to enter to take the same, the defendant says there are many leases of the same kind (by the testator and his father, the former owners,) of lands in the parish of Porlock, where mines, &c. are not excepted, namely,—(The case here specifies five leases.)

As to there being no reservation of the rent half-yearly, but instead thereof a quarterly reservation, the defendant says that there are many leases of the same kind in the parish of Porlock, made by the testator and his father, in which the rent is reserved quarterly. (The case here specifies seven leases, and refers to nine others as being to the same effect.)

As to there being no reservation of liberty to hunt, hawk, fish, or fowl, the defendant says, that in leases of the same kind in the parish of Porlock by the testator and his father, this liberty is not reserved in any other manner, and that in many leases it is altogether omitted. (The case here specifies five instances, and refers to forty-six others.)

In a lease, dated 1779, of a messuage with courtlage, garden, and orchard, containing one acre and a half, with the appurtenances, (excepting all wood and right of common,)—mines, quarries, hunting, hawking, and shooting, and all other royalties whatsoever are reserved, and the same form of reservation occurs in four other similar leases.

As to the heriot, the defendant says that the reservation of a sum of money for a heriot is usual in leases of the same kind, and made by the testator or his father, of lands, &c. in the parish of Porlock, and that there are fifty such leases,—as is also the reservation of the best beast or best good, with which there are forty-four leases, and of the best beast, or good, or money, with which there are thirteen leases; and that there are fourteen leases with the reservation of the best beast or best good of the party possessed of the premises, and entitled under the lease.

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half-yearly  
reservation.

Hunting, &amp;c.

Heriot.

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Re-entry.

The defendant instances the following leases in which are reserved *money* heriots, the immediately preceding lease having reserved the best *beast* or the best *good*. (Five such instances are here given.)

As to the reservation of the right of re-entry, the defendant says there is no *usual* reservation in this respect in leases of the same kind in the parish of Porlock, and she produces the following instances of leases without such a reservation. (Two instances are here given in detail, and twelve others are referred to.)

The testator granted eighty-five leases, and there are one hundred and twenty-eight other leases granted by prior owners. And of the said eighty-five leases granted by the testator, forty-nine contain the said reservations of trees, &c.—forty-one contain the reservation of a right to hunt, shoot, sport, &c.—seventy-five contain a reservation of the rent half-yearly; and seventy-three contain the reservation of suit at the lessor's manor-mill,—and eighty-one contain a reservation of a right to re-enter in case there should be no *overt* distress upon the premises.

Usual covenants.

And the plaintiff contended that two of these leases, dated February 17th and October 12th, 1779, were such leases as were *usually* granted by the testator in the manor of Porlock, and as evidence thereof produced from the lessors of the plaintiff's muniment-room two agreements found there with the two leases, each agreement bearing date the 13th October, 1778, and each made between and signed by the testator and *Abraham Phelps*, whereby the testator agreed to grant the said two leases to *Phelps*; each of which agreements contain the following clause:—

“The said *Abraham Phelps* agrees to execute a counter-part of such lease to Mr. *Blathwayt*, and to enter into such covenants as are *usual* and proper in leases of the like kind for the manor of Porlock.”

Copies of the several leases accompany the case.

If, under any of the circumstances hereinbefore stated,

the Court shall be of opinion that the leases of 1804 and 1820 were invalid, then the verdict is to stand; otherwise, to be entered for the defendant.

The case was argued in Easter term, 1834.

*Follett*, for the plaintiff, in support of the objections stated in the special case, cited *Co. Litt.* 47 a; *Doe d. Earl of Shrewsbury v. Wilson* (a); *Smith v. Doe d. Earl of Jersey* (in error) (b); Judgment of Lord *Eldon* in that case (c); *Smith v. Bole* (d); *Doe d. Bartlett v. Rendle* (e); Lord *Mountjoy's* case (f); *Tomlinson v. Day* (g); *Com. Dig. Copyhold* (K), 20; *Randall v. Scory* (h); *Sugden on Powers* (i); *Coxe v. Day* (k); *Doe v. Meyler* (l).

*Bere*, contra, cited *Doe d. Duke of Devonshire v. Cavendish* (m); *Fancy v. Scott* (n); *Hay v. Coventry* (o); *Bradley v. Peixoto* (p); *Ware v. Cunn* (q); *Roe d. Brune v. Rawlings* (r); *Taylor d. Atkyns v. Horde* (s); *Clun's* case (t); *Dean and Chapter of Worcester* case (u); *Cruise's Digest, Franchise* (x); *Wilkinson's Office of Coroner*; *Keble v. Hickringill* (y); *Dann v. Spurrier* (z); *Heyward's* case (a); *Bac. Abr. Conditions* (O 1) (b); *Williams on Executors*, 1224.

*Follett*, in reply, cited *Pickering v. Noyes* (c).

(a) 5 Barnw. & Alders. 363, 381, 389.

(b) 2 Brod. & Bingh. 473; 5 B. Moore, 332.

(c) 2 Brod. & Bingh. 606, 607.

(d) Cro. Jac. 458.

(e) 3 Maule & Selw. 99.

(f) 5 Co. Rep. 3 b, 5 b.

(g) 2 Brod. & Bingh. 680.

(h) Cro. Car. 313.

(i) Page 630.

(k) 13 East, 118.

(l) 2 Maule & Selw. 276.

(m) 3 Dougl. 48, 53; S. C. 4 T. R. 741, n.

(n) 2 Mann. & Ryl. 335.

(o) 3 T. R. 83.

(p) 3 Ves. 323.

(q) 10 Barnw. & Cressw. 433; 5 Mann. & Ryl. 341.

(r) 7 East, 287.

(s) 1 Burr. 121.

(t) 10 Co. Rep. 128.

(u) 6 Co. Rep. 37, 38.

(x) 3 Cruise's Dig. tit. xxvii.

(y) 11 Mod. 74.

(z) 3 Bos. & Pul. 399, 403.

(a) 2 Co. Rep. 35.

(b) 1 Bac. Abr. 652, 5th & 6th ed.

(c) 7 Dowl. & Ryl. 49; 4 Barn. & Cressw. 639.

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In the course of this term judgment was pronounced by Lord DENMAN, C. J. as follows:—

The question in this case is, whether the leases of 1804 and 1820 can be supported.

There is an existing life under each lease. Suppose, therefore, that the lease of 1804 should appear to be invalid, if that of 1820 should be valid and now in force, it would defeat the plaintiff's right of action.

The tenant for life was enabled to grant leases in possession or reversion; the lease of 1820 is made to commence "on the death of *Benjamin Floyd* or other sooner determination or avoidance of such estate or estates as are now granted therein and subsisting, and determinable on the death of the said *Benjamin Floyd* as aforesaid, for the remainder of a certain term of fourscore and nineteen years, by indentures of lease, &c." The case does not state whether *Benjamin Floyd*, or who else, is the existing life under the lease of 1804. If *Benjamin Floyd* be dead, the lease of 1820 took effect on his death: if he be still alive, then, (inasmuch as the lessors of the plaintiff repudiate the leases both of 1804 and of 1820,) if that of 1804 be not a valid one, it is, at all events, at an end, as the estate thereby granted is determined by the death of *Mary Blathwayt*, the tenant for life; and therefore it is not, in strictness, necessary to inquire into the validity of the lease of 1804 (a). We may also observe, that many of the cases cited arise upon *Ecclesiastical* leases under the 1 *Eliz.* c. 19, s. 7, and 13 *Eliz.* c. 10, s. 3. The words of those statutes are in substance the same as those in the power created by the will of the testator, *William Blathwayt*, of 21st February, 1765, and the same reasoning will apply to both.

The power of leasing in this case embraces three different classes or descriptions of property.

First.—Premises in or near London,—for twenty-one years.

(a) i. e. provided the lease of 1820 be valid.

Secondly.—Premises in Porlock which have been anciently demised,—for ninety-nine years, determinable on two or three lives, either in possession or reversion.

Thirdly.—Other premises in Porlock,—for twenty-one years.

It is upon the second description that this case arises.

One provision as to these leases is,—“so as that the ancient and accustomed yearly rent and other reservations be thereby reserved.”

Some provisions applicable to the two other classes are stated, after which comes the following general clause applicable to all the three classes.

“All and every such several leases of my said estates at Porlock, held, or to be held for ninety-nine years, determinable on lives, and of my said farms, lands, and estates, being from time to time made and granted, in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements as are *usually and customarily* contained in leases of the same kind in the several and respective parishes and places where the said premises are situated.”

The second class of cases therefore contains two sets of provisions: 1st. That the *ancient and accustomed rent and reservations* be reserved. 2d. That they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements, as are *usually and customarily* contained in leases of the same kind in Porlock. The first applying to what has been done as to the ancient rent and reservations on *the particular premises* leased, and the other as to what is the usual and accustomed course upon *other premises* in Porlock, without reference to any ancient usage. And unless both these sets of provisions be complied with, the lease cannot be supported.

One question for our consideration is, whether other leases of the same kind in Porlock are admissible in evidence; and we have no doubt that they are so, for it is quite

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impossible to know what was the course and custom of covenants, agreements, &c. contained in leases of other premises in Porlock, unless the leases be resorted to; but then when that is done, the evidence thus obtained only applies to the *second* set of provisions, which we have before alluded to as contained in the latter part of the leasing power, and cannot affect the former part, which requires the ancient rent and reservations, because as to these it is clear, on the wording of the power, that the rent and reservations of the particular property are alone to be attended to. If the provision as to the ancient and accustomed rent and reservation shall be found to have been satisfied and complied with, it will then, and then only, be the subject of inquiry, whether the covenants, &c., contained in leases of other premises in Porlock, have also been adopted, so as upon the whole to make a complete and perfect lease, according to the two sets of provisos comprised in the power.

Ancient rent.

That being so, it becomes necessary to ascertain what are the ancient rent and reservations as to the particular tenement; and in considering that, the proper evidence is the last lease, as to which it was said by Lord Holt in *Orby v. Lord Mohun* (a), (which arose upon the construction of a power,) that shall be deemed the ancient rent which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease. In *Morrice v. Antrobus* (b), which arose upon a lease made by the Petty Canons of St. Paul's, for twenty-one years, where three other leases at less rents and with larger exceptions were referred to, Hale, C. B. said, that the *accustomed* rent mentioned in the statute ought to be understood of the rent reserved in the *last* lease, and not upon the first,—for that rent having been altered since, cannot be called the *accustomed rent*. But whether this position be right or not, the lease of 1756 is the only evidence there is of what had been the accustomed rent and reservations, and as this lease

(a) 2 Vern. 542, reported also in Chancery, 257.
 in 3 Chancery Rep. 56, and Prec. (b) Hardres, 325.

was granted nine years only before the date of the will, we may fairly conclude that it was the last lease before the will, and therefore must necessarily be attended to.

First, as to the rent: it is the same in amount in all the leases—of 1756, 1804, and 1820, and the general description of the premises is the same in all, subject only to the exceptions which will be hereafter noticed. But it is not merely the amount of the *ancient rent* reserved, but it must be reserved with all the *beneficial circumstances*; as was said by Lord *Mansfield*, in delivering the judgment of the Court in *Taylor d. Atkyns v. Horde (a)*. And the first point raised upon that is, that by the lease of 1756, the rent is payable *half-yearly*, whereas by those of 1804 and 1820, it is payable *quarterly*. On a quarterly reservation, if the tenant for life die in the *first* portion of the half-year, the remainder-man will receive both the first and second quarters' rent of the half year, and will therefore be in the same situation as if the rent had been reserved half-yearly; but if the tenant for life die in the *second* portion of the half-year, the first quarter will be received by the tenant for life, and the second quarter only by the remainder-man, who will consequently be in a worse situation than if the rent had been reserved half-yearly. This however is only a "contingency," and may or may not happen; and it is to be seen whether that would avoid the lease. In Lord *Mountjoy's* case (*b*), where tenant in tail, under a special act of parliament, in the time of *Henry 8*, was empowered to grant leases, rendering the true and ancient rent, the tenant in tail made a lease reserving the rent to be paid at *two feasts* of the year, where the old rent was payable at *four feasts*; and one of the points, which after many arguments and great deliberation and consideration were resolved, was, that "the reservation of the rent at two days, where the rent had been reserved payable at four days, makes the grant and render void, because it is ad nocumentum of the heirs in tail, which is restrained by the act; for it is more beneficial for them to have it paid at

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reservation.

(a) 1 Burr. 121.

(b) 5 Co. Rep. 3 b; *ibid.* 5 b, 4th point.

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four feasts than at two, and all beneficial qualities of the rent ought to be preserved and obeyed."

Now if this decision be correct, it seems difficult to say that a lease is void for reserving the rent at four days instead of two; the new lease need not be a fac-simile of the old one; all that is to be done is to see that the remainder-man is not *prejudiced*, and there can be no doubt but a rent payable at four feasts is, upon the whole term created, more beneficial than if payable at two feasts, though there is a *possibility* that as to one quarter the remainder-man may be prejudiced; but that is a *contingency*, and even if it does happen, there is the benefit of the quarterly instead of the half-yearly payments, during the rest of the term. But after all it may be said, that increasing the number of days of payment should be shewn to be warranted by decided authority. The benefit to the successor is differently treated in *Baugh v. Haynes (a)*, on a lease made by a dean and chapter, where the former lease had reserved the rent at *four* feasts and a heriot, and the lease in question reserved the rent at *two* feasts without the heriot:—The Court held that the omitting the *heriot* did not avoid the lease, because only a *rent* was mentioned in the statute, and they said that a reservation at *two* feasts instead of *four* was no objection to the lease, for it was for the *benefit (b)* of the successor. So, in the *Dean and Chapter of Worcester's* case (c), where the former lease made the rent payable at four feasts, and the lease in dispute at two, the Court held that it was sufficient if the accustomed rent be reserved yearly at *one* time, for the words of this act are—"whereupon the accustomed yearly rent or more shall be reserved," and therefore if the rent be yearly reserved, the statute is satisfied by reason of this word "yearly," and so there is a difference between this and Lord *Mountjoy's* case, for there wanted the word *yearly*, which explains the intention of the makers of the said act of 13th of *Elizabeth*. *Co. Litt.* 44 b, is in accord-

(a) Cro. Jac. 76.

(b) A reservation at four feasts instead of two, whereby he would

lose that benefit, would therefore be to his *prejudice*.

(c) 6 Co. Rep. 37.

ance with this latter doctrine. None of these cases, however, shew what effect has been given to the *increasing* of the number of rent days(a). In *Cook v. Younger*(b), the office of under-steward of the courts of the manor of Heysham, and other manors of the Bishop of Gloucester, was anciently an office grautable for term of life with the fee of 3*l.* 6*s.* 8*d.* by the year, and it was granted by a former Bishop of Gloucester to the plaintiff for life, with the fee of 3*l.* 6*s.* 8*d.*, payable annually at two feasts, issuing out of the manors. The bishop died, and the plaintiff was ready to keep the Courts of the new bishop, but the defendant claiming under a grant from the new bishop, disturbed him from keeping them; and one of the objections to the grant to the plaintiff was, that the prescription was, that the office was grantable with a fee of 3*l.* 6*s.* 8*d.* by the year, whereas here the payment was appointed to be at *two* feasts:—But the exception was not allowed, and to confirm their opinion the case of the *Dean and Chapter of Worcester* was vouched, for the purpose of shewing that the days of payment are not material where no less than the ancient rent is reserved yearly. It does not indeed appear by this report, how the *former* payments had been. As it is put upon the footing of prescription, it may be inferred that they were made *yearly*.

Of late two cases have occurred applicable to the present. In *Doe d. Earl of Shrewsbury v. Wilson*(c), a power of leasing under a private act contained the following clause: "So as upon all and every such lease and leases there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed *yearly* rents, boons, and services," &c. &c. A lease was made in 1785 under this power, reserving the rent *half-yearly*. It appeared that in 1708 a lease, and in 1756 another lease, had been made of the same premises, in which the rent was reserved *half-yearly*; and amongst other objections urged against the lease of 1785, one was, that the rent had been reserved *half-yearly*; whereas by the power it ought to have been

(a) *Vide ante*, 820(b).

(b) Cro. Car. 16.

(c) 5 Bar. & Ald. 363.

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reserved only *once a year*. The Court held the lease to be sufficient. But the principal ground on which they decided was, that the former leases, which were admitted in evidence, made the rent payable *half-yearly*, and the lease of 1785 mentioned the *usual and accustomed* yearly rent; and therefore that case does not assist the construction that is to be put upon the present leasing power, as to whether the reservation in the lease of 1756 as to the times of payment, is to be observed, any further than the general remark of *Abbott, C. J.*,—that the usual and accustomed yearly rent means the yearly rent of so many pounds, *by so many half-yearly or quarterly* payments in the year. It is to be observed, that he and *Bayley, J.*, differ in their opinions as to a rent being made payable once a year, the former saying it is “not beneficial to the landlord,” and the latter that it is “more beneficial to the successor.” In *Doe d. Harris v. Moore (a)*, the leasing power in a marriage settlement of 1777 provided that there should be reserved, by half-yearly payments, the best and most improved yearly rents. In 1783 a lease was made, reserving the rent at the feasts of *St. Philip* and *St. James* (1st May), and *St. Michael* (29th September). The Court held the lease void, for the reason, amongst others, that the half-yearly payments ought to have been on *usual* days of payment, and that it required a division of the rent, as nearly as may be, into *two equal half-yearly* payments, which this did not, one interval being 151 and the other 214 days, though the usage of the country might make a different division. In *Doe d. Harris v. Moore, Bayley, B.*, says, the tenant for life is not to throw on the remainder-man, without his sanction, the uncertainty of the chances which *may* turn out to his prejudice.

Amongst these conflicting authorities, it is very difficult to come to a conclusion on this part of the case. It is not, however, necessary to do so, because there is another ground upon which we are enabled to give judgment.

Re-entry.

Another objection is, that the lease of 1756 gives a power

(a) 4 Tyrwh. 185.

of re-entry if the rent be in arrear *twenty-one* days; whereas the leases of 1804 and 1820 give the right of entry after *twenty* days. The latter provision is *more* beneficial to the remainder-man.

Another objection is, that in the lease of 1756 the right of entry is, "if there be no *overt* distress on the premises;" which word "*overt*" is omitted in the two leases of 1804 and 1820. But we think that this is not a valid objection. The law recognizes a difference between a *pound overt* and a *pound covert*; but as to a *distress*, the law does not affix any particular meaning to the word *overt*. Is "*overt*" to be confined to what may be seen by walking over the lands and farm-yard, without going into any inclosed buildings?—or does it extend to what may be seen by opening the outer doors of a house or other buildings?—or what may be seen by opening inner doors,—or by opening cupboards, chests and boxes, which are not concealed and have no locks,—or various other shades of being more or less overt? So many opinions may be formed about the extent of the meaning of the word, that we cannot attribute any legal effect to it.

As to the *heriots*. Under *ecclesiastical* leases, though *heriots* should have been reserved under former leases, it appears that the omission of *heriots* forms no ground of objection to a new lease, because it is only *rent* which is mentioned in the statute; but under the power now in question, inasmuch as *heriots* were reserved in 1756, the ancient reservations made in the new leases must be *heriotable*.

The *heriots* are different in all the three leases. Under that of 1756 it is the *best good* of *William Frost* or such person as shall be in possession of the premises. Under that of 1804 it is the *best good* of *William Lock*. Under that of 1820 it is the *best good* of the person or persons who, for the time being, shall be tenant or tenants in possession of the premises.

We by no means say that the lease of 1804 is objectionable; for as the payment of these *heriots* (should the *heriot* reserved be refused) can only be enforced by distress or action, as it is not a *heriot* by ancient tenure or custom,

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but only by deed, *Edwards and another v. Mosley and another* (a), a distress may be made of the best beast of *John Lock*, if alive, or should he be dead or have parted with the premises, what *was* his best beast. But the lease of 1820 is in effect the same as that of 1756; and the only reason for not inserting the *name* in that of 1820, to correspond with the insertion of that of *William Frost* in that of 1756, seems to have been, that the lessee in that of 1820 was not one of the lives; whereas in that of 1756 *William Frost*, who was the lessee, was also one of the lives.

Secta ad
 molendinum.

As to the reservation of suit to the mill, the difference is, that in the lease of 1756 the *lord of the manor* is mentioned, and in the other, 'the *owner of the inheritance*. That can make no difference. (b)

Secta ad
 curiam.

To the reservation of suit of court, no objection is made.

Hunting, &c.

The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are "reservations." That which relates to the privilege of hunting, hawking, fishing, and fowling, is not either a reservation or exception in point of law: Though words of *reservation* and exception are used, it is only a privilege or right *granted* to the lessor.

Wood and
 underground
 produce.

We think that what relates to the wood and the underground produce is not a *reservation*, but an *exception*. Lord Coke(c) says, "Note a diversity between an exception—(which is ever of part of the thing granted and of a thing in esse), for which exceptis, salvo(d), præter, be apt words,—and a reservation, which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." In *Shepp. Touch.*(e), it is said "A *reservation* is a clause of a deed, whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before." And afterwards, "This doth differ

(a) Willes, 192.

(b) The only difference would be in *favour* of the new leases, as the right is preserved to the reversioner, being owner of the mill, al-

though he may have parted with the *manor*.

(c) Co. Litt. 47 b.

(d) *Post*, 825.

(e) p. 80.

from an exception, which is ever of part of the thing granted, and of a thing in esse at the time; but this is of a thing newly created or reserved out of a thing demised, that was not in esse before; so that this doth always reserve that which was not before, or abridge the tenure(a) of that which was before." And afterwards, "It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." And afterwards, "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass or of the vesture of the land, or of a common or other profit to be taken out of the land, then these reservations are void." In *Bro. Abr. Reservation*, pl. 46(b), it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted; and it is not like the case where a man leases his manor and the like, *except* Whiteacre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that though in *Co. Litt.* 47 a, the distinction between a reservation and an exception is pointed out, yet in p. 143a, speaking of the word *reservation*(c), Lord Coke says, "Sometimes it hath the force of *saving* or *excepting*, so as sometimes it serveth to reserve a new thing, viz. a rent, and sometimes to except part of the thing in esse that is granted." But he does not go on to illustrate that position(d); and as only two pages before, in 142 a, he had said (to the same effect as he had done in the former reference in 47 a,)

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(a) i. e. "tenor."

(b) Citing Doctor & Stud. lib. 2.

(c) Or rather of the word "reserve," which is often coupled with the word "except," even in creating a mere exception.

(d) Lord Coke refers, however, to M. 35 H. 6, fol. 34, where the

words are "Salvo servicio et redditu—debito et consueto," and where "salvo," though ordinarily a word of *exception*, was held to enure as a word of *reservation*; which is the *converse* of the above proposition.

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that a man upon his feoffment or conveyance cannot *reserve* to him parcel of the annual profits themselves,—as to *reserve* the vesture or herbage of the land, or the like, for that should be repugnant to the grant,—we cannot take this language of Lord Coke, in 143 a, as identifying an exception and a reservation. There are, however, some cases reported where, in the language of the Court, the word *reserve* is treated as meaning *exception*, as in *Dyer*, 19 a. That, however, is only general language, and it does not make them the same in point of law. In the very late case of *Fancy v. Scott* (a), the defendant pleaded that the plaintiff was tenant to the defendant of the close in which &c. subject to a *reservation* to the defendant of all pits in the close, with liberty to carry away the produce of the pits. Bayley, J. said, it was not a *reservation*, but an *exception*, and held the plea bad; and the counsel for the defendant did not further press the argument. It may be said, however, that if the person who creates the power uses the word “reserving” in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers are construed so very strictly in many respects, that they must be so throughout. But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation. There are other legal reservations, besides rent, to satisfy the words “rent” and “reservations;” and when the testator, in the lease of 1756, mentions wood and underground produce, he says, “except and always reserved out of this present demise and grant all,” &c. &c.; and therefore if, in point of law, the matters are the subject of *exception*, they must be applied to the legal term used. And in the *Earl of Cardigan v. Armitage* (b), where Sir Thomas Denby enfeoffed the Earl of Sussex of certain closes, *except and always reserved* out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c. &c.,—Bayley, J., in delivering the judgment of the Court, says that this constituted an *except*—

(a) 2 Mann. & Ryl. 335.

(b) 3 D. & R. 414; 2 B. & C. 197.

tion; and he states the distinction between an exception and a reservation, and then goes on to point out the effect of an exception upon the statement in the pleadings.

Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a *reservation*, but an *exception(a)*; and then it will be necessary to consider what effect this has upon the lease.

The mines, quarries, &c. need not be considered, because the lease of 1820 is, though not precisely in words, yet in substance, conformable to the lease of 1756, though, if the title of the defendant had stood upon the lease of 1804 alone, it might have been questionable.

In the lease of 1756 the exception is, of "all and all manner of timber trees, and trees likely to prove timber." In the two other leases of 1804 and 1820, it is "all timber trees, bodies of pollard and other trees whatsoever." By the lease therefore of 1756, the entire timber trees, and trees likely to prove timber, are excepted, whereas in the other leases the entire timber trees, but only the *bodies* of trees likely to prove timber, are excepted, leaving, therefore, the upper part of these trees from which lops, tops, and boughs might be taken, unexcepted; but then, in lieu of that, in the other two leases, the bodies of pollards and all other trees, including all such other trees as are not likely to prove timber, are excepted, and one would say, that in most cases the remainder-man would be a gainer by such substitution; but we cannot say so on any *legal* principle, and therefore that cannot be acted upon. Under the terms of the lease of 1756, the remainder-man would have a right to cut, take, and carry away the tops and boughs, and shrouds likely to become timber; but though he now loses that right, the *lessee* has no general right to do so; the right he has is, to have the benefit of those tops for fruit and shade, and to take them for certain descriptions of repairs.

A great variety of cases have occurred and several distinctions made, both formerly and in later times, where

(a) *Vide* 19 Vin. Abr. 116, 126; 3 Nels. Abr. 151; 3 Hughes' Abr. 1737.

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lands comprised in a power are demised along with other lands to which the power does not apply; or where the power is well executed as to part, and not as to the rest; or where part of the lands only are comprised in the power *as far as* demised under former leases; but this principle, at all events, seems to be established, that where lands are let at an ancient rent, and the new lease grants that which was not anciently let, in addition to what was granted before, and only reserves the same rent that was reserved before, the power is badly executed, and the lease is void for the whole. Even when an additional rent is reserved, where new land is added to the old, the lease is void for the whole, unless, perhaps, there be a distinct reservation for the new land, as appears by *Co. Litt.* 46, b., where it is said "If twenty acres of land be accustomedly letten, and a lease be made of these twenty, and of one more which was not accustomedly letten, at the accustomed yearly rent and so much more as exceeds the value of the other acre, this lease is not warranted by the act; for the accustomed rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole." The same rule is laid down in Lord *Mountjoy's* case (a), and also confirmed in the case of *Doe dem. Bartlett v. Hindle* (b). But, as more distinctly applicable to the present case may be cited *Smith v. Bole* (c). "A prebend was usually let with the exception of all crab trees, and such like trees, rendering 17*l.* a year; afterwards another lease was made, omitting the exception, at the ancient rent, and it was resolved that the lease was void, for there being more let than was anciently, viz. the trees and the profits of the trees, and the soil itself is excepted by this exception, so as every successor cannot have the benefit of the boughs and fruits yearly renewing; and the soil itself whereupon they grow is excepted, but by this new lease the trees and profits are let, and the soil itself, and so more being let than anciently it

(a) 5 Co. Rep. 3, b.

(c) Cro. Jac. 458.

(b) 3 Maule &amp; Selwyn, 99.



is not within the statute of 32 *Henry* 8, c. 28; and it is void by 13 *Eliz.* c. 10, for it is not the ancient rent where more is let than before." The same case is also reported in 3 *Bulst.* (a), but it is not there stated that the new lease was at the same rent. In the notes to *Hargrave* and *Butler's Co. Litt.* 44 b., n. 261 (b), it is said, "A prebendary makes lease for years, reserving the running of a colt, rendering rent: a new lease, rendering the same rent, without reserving the running of a colt—adjudged good; because, *quoad* this, it is neither a reservation nor exception. But if lease be made of a manor, *except the woods*, rendering rent, and after the expiration of it there is a new lease, rendering the same rent, without such exception, the second lease is bad. T. 18 *Jac. B. R.* case of *Precentor of St. Paul's, Hale*, MSS." There is, however, a case of *How v. Whitfield* (c), which, if it were to be held as law, might seem to affect the generality of this proposition. A power was given to a lessee of five acres of land and his assigns, to let leases for twenty-one years, reserving the ancient rent. An assignee made a lease of the five acres, *inter alia*, reserving *proinde* the rent of 6s. a year, which was the ancient rent:—"As to reserving the rent *proinde*, the Court said, that it might be intended that the *inter alia* comprehended nothing but such things out of which a rent could be (d) reserved, and then the 6s. was reserved only for the five acres. However, the *proinde* might reasonably be referred only to the five acres, and not to the *inter alia*, and that a distinct reservation of the 6s. might be for the five acres." But in the report of the same case by Sir *Thomas Jones* (e), it is said the Court thought this to be a good exception, but that the defendant (f) perceiving the opinion of the Court as to the great point, consented, upon payment of costs, that judgment should be given for the plaintiff. The case is also reported in 2 *Shower*, 57, where it appears to have been argued on another point, and *Jones* and *Pember-*

(a) Page 290, per nomen *Smith v. Bowles*.

(b) By Mr. *Hargrave*.

(c) 1 *Ventr.* 338, 339.

(d) *i. e.* agreeably to the power.

(e) 1 *Jon.* 110.

(f) *i. e.* the defendant in replevin, who disputed the lease.

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ton, justices, seemed to have entertained different opinions; and the case, as reported in *Ventris*, it should seem, cannot be relied upon.

A question, however, may arise as to this exception—whether the lops of the trees are *demised* at all, or whether there is not a mere *privilege* vested in the lessee by virtue of the demise to take the lops and shrouds of the trees likely to prove timber, for repairs and fuel? and then, if they be not *demised*, the ancient rent may be said to be reserved for the rest, which is really demised. But we are of opinion, that the lops of the trees likely to prove timber are *demised*. By a general demise of lands on which there are timber trees, without any exception, the timber trees are demised as well as the lands. It is true that the lessee has not the same extent of interest in the trees that he has in the lands; he has only a *particular* interest and a *special* property in them, and is entitled to the mast, and fruit, and shade of trees, and may also take them for repairs and fuel, (subject, as to fuel, to some observations;) and the lessor has the *general* ownership, right, and inheritance, and if they become disannexed from the inheritance, the lessor shall have them; and in the report of *Pomfret v. Rycroft (a)*, *Twisden*, J. says at the end of the report, which was as to the use of a pump, that he conceived, that if the lessor cuts down trees growing upon the land demised, no covenant lies, yet the trees are demised with the rest. The same rule would hold as to the lops of trees. We do not think it material whether a *rent* could *issue out* of them; they form, along with the lands, one entire *subject of demise*; these lops and shrouds may perhaps be considered as amongst the *de minimis*, but that is not so; they may, in some cases, be of such value as may be worth attending to, and the want of power to cut them down is a prejudice to the inheritance, and the right to cut lops, tops, and shrouds, appears in several instances to have been the subject of inquiry. And it may be observed as to this, that if the whole of the trees likely

(a) 1 Ventr. 41; and see 1 Saund. 321, S. C.

to prove timber are excepted, the lessor and other future owners of the inheritance may cut both bodies, and lops and tops, when they please; but if only the bodies are reserved, they cannot cut the bodies down, for they cannot do so without also cutting down the tops, which they have no right to do, because the lessee would have an interest in them for repairs and fuel, and for the fruit, and shade for his cattle.

We are therefore of opinion, that inasmuch as the exception in the lease of 1756, as to the wood, is larger than the exception contained in the leases of 1804 and 1820, the premises cannot be taken to have been demised at the ancient rent, and that on this ground both the latter leases are void.

It becomes therefore unnecessary to consider what effect the other leases would have had. If the point had been necessary to be considered, it would have been impossible for the Court to have decided on the effect of such a mass of matter, and it must have gone to a jury. It may, however, be remarked that in the clause in the power which says that the leases are to be conformable to other leases in the parish, there is the word "reservations," and it might be said to be necessary to inquire what the reservations were in other leases; but in our view of the case, the reservations cannot affect the decision, and if they could, the inquiry must have been limited to ancient reservations under leases of the same premises.

Judgment for the plaintiff.

COTTON v. BROWN.

**CASE**, for maliciously and without any reasonable or probable cause, indicting the plaintiff for a conspiracy. The defendant pleaded two pleas; first, not guilty; secondly, that the defendant caused the plaintiff to be indicted for reasonable and probable cause and without malice;

In an action for a malicious prosecution, the Court will not permit the defendant to plead that he had probable cause

to indict, together with a plea of not guilty.

The plea of not guilty to an action for a malicious prosecution, puts in issue (under the new rules of H. T. 1834,) the fact of prosecution, and the want of probable cause.

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and the plea set out a great number of circumstances tending to shew probable cause for preferring the indictment. At the commencement of this term *E. V. Williams* obtained a rule calling upon the defendant to shew cause why the second plea, or so much thereof as the Court should direct, should not be struck out.

*Archbold* now shewed cause. Before the late rules(a) a defendant might either plead this justification specially, or give it in evidence under the general issue, and there is nothing in the new rules which alters the practice in this respect. On the contrary, it was evidently intended by the new rules to *oblige* a defendant to plead his defence specially in all cases where the giving matter in evidence under the general issue might take a plaintiff by surprise. It is, therefore, at least doubtful whether, since the new rules, this defence *could* be given in evidence under the general issue. [Lord *Denman*, C. J. The wrongful act complained of is the indicting, with a want of reasonable and probable cause: Surely the general issue puts in issue all that.] By the new rules all matters of confession and avoidance, in actions on the case, are to be specially pleaded; and the facts stated in this plea are matters in confession and avoidance. In *Frankum v. The Earl of Falmouth*(b), which was an action on the case for the diversion of a watercourse, the Court held that the plea of not guilty put in issue the mere *fact* of diversion, and not its *wrongful* character. But whether, under the new rules, the defendant may give this defence in evidence under the general issue or not, those rules do not *prevent* him from pleading it specially, as he might have done before those rules were made.

*E. V. Williams*, *contra*, was stopped by the Court.

(a) H. T. 1834, *ante*, vol. iii. pp.  
 1 to 21.

(b) *Ante*, 330.

LORD DENMAN, C. J.—We are clearly of opinion that the rule should be made absolute to strike out the whole of the second plea, and that the defendant is wrong(a) in stating, on this plea of justification, that there was not a want of reasonable or probable cause. The wrongful act complained of is not the indictment *alone*, nor is it the want of reasonable or probable cause alone, but the indictment *together with* the absence of reasonable or probable cause for preferring it.

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LITLEDALE, J. concurred.

PATTESON, J.—This case is clearly distinguishable from *Frankum v. The Earl of Falmouth*. In that case there was an assertion of a *right* in respect of particular property, and an allegation of an injury done to that right; and the Court held that the plea of not guilty did not put in issue *the right* as claimed by the plaintiff. Here, there is no assertion of any right.

COLERIDGE, J., concurred.

Rule absolute accordingly.

(a) This part of the judgment would tend to shew that the plea was not only *superfluous*, but that if it had stood alone it would have been *insufficient*. The plaintiff complains of a grievance consisting of two ingredients, both necessary to constitute an actionable injury. The admission in the plea of the existence of *one* of those ingredients, namely, the preferring

of the indictment, does not appear to make the plea bad, as acknowledging that the plaintiff has a complete cause of action against the defendant; and coupled with that admission, the plea denying the absence of probable cause, seems to tender a material issue, upon which the propriety of the action might be decided.



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## GARRITT v. SHARP.

A party may so alter the mode of enjoyment of ancient lights as to lose the right to them altogether.

**CASE**, for obstructing the lights belonging to a malt-house of the plaintiff. Plea: that there were not nor ought to be any lights to the plaintiff's buildings: upon which issue was joined (a). At the trial before *Tindal, C.J.*, at the Hertford summer assizes in 1834, it appeared that the plaintiff had been, for twenty years previously to the commencement of the action, possessed of a barn at Sawbridgeworth, abutting upon property of the defendant's. This barn had openings along the side, which was made of planks, through which light and air were admitted. The plaintiff adduced evidence to shew that these openings had been purposely left in the planks at the time of the original construction of the building. The defendant endeavoured to shew that they were merely the result of wear and accident. The plaintiff turned the barn into a malting-house, and upon his so doing, closed up many of the openings, and made in their place latticed windows, which, upon the whole, admitted much more light and air than the openings previously did. After the alteration had been made, the defendant built a wall on his own ground, and hindered the admission of light into the malting-house. The defendant tendered evidence to shew that by the alteration he was much prejudiced; amongst other things he was annoyed by the swearing of the workmen in the malting-house. This evidence was rejected by the learned Chief Justice, who told the jury that a party, after having acquired a right of this description, is entitled to vary it for a different purpose; and his lordship left two questions to the jury, first, whether from the evidence they could presume a grant; and secondly, whether that grant was of a limited nature; and

(a) There was a second count in the declaration, and a plea to it, to which it is not necessary more particularly to advert.

told them that if it was so, and by reason of the defendant's act, the quantity of light which entered the malt-house fell short of that which used to enter the barn, they should give the plaintiff damages for the diminution, for that he was entitled to the same degree of light as he formerly possessed. The jury found a verdict for the plaintiff. A rule nisi having been obtained for a new trial, on the ground of misdirection and rejection of evidence,

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*Platt* and *Harrison* now shewed cause, and contended, first, that the direction was right, and that the only question was, whether the verdict was against the weight of the evidence.

With respect to the rejection of evidence, they contended that no evidence had been tendered.

[Lord *Denman*, C. J., with respect to the alleged misdirection, referred to *Martin v. Goble* (a), and *Moore v. Rawson* (b).]

*Thesiger*, contra, contended, that upon the whole facts of the case the learned Chief Justice should have directed a verdict for the defendant; and that a party might lose this kind of right by essentially altering the mode of enjoyment, since a person who might acquiesce in one mode of enjoying an easement of this description, might have great objection to another mode; and he further contended that the evidence was rejected by the learned judge.

[*Coleridge*, J., referred to *Cotterell v. Griffiths* (c).]

LORD DENMAN, C. J.—As the report of the learned Chief Justice is silent as to the rejection of the evidence, and as there appears also some doubt as to what were the

(a) 1 Campb. 320.

Barn. & Cressw. 332.

(b) 5 Dowl. & Ry. 234; S. C. 3

(c) 4 Esp. N. P. C. 69.

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terms of his lordship's direction to the jury, we will speak with him upon the subject.

Lord DENMAN, C. J., on a subsequent day in this term, delivered the judgment of the Court as follows :—

This was an action on the case, for stopping up ancient lights, which was tried before the Lord Chief Justice of the Common Pleas at Hertford, and a verdict was found for the plaintiff. A rule for a new trial, for misdirection and rejection of evidence, was subsequently obtained. The misdirection imputed was, that it was left to the jury to consider the case as if the *mode* of enjoying the light obstructed, before the obstruction, was not material to be considered, provided the plaintiff were deprived by the defendant's act of the same *quantity* of light as he previously had enjoyed. The evidence said to be rejected was intended to shew that the mode of enjoyment had been essentially altered by the plaintiff himself, to the inconvenience or injury of the defendant.

The learned Chief Justice has reported to us that the question he left to the jury was, whether the apertures in the wall of the plaintiff's tenement were placed therein on purpose to admit light, and whether the defendant had obstructed any portion of the light admitted. He does not recollect any evidence being tendered of alterations made by the plaintiff as above mentioned. We think it, however, clear that the point was made, and that the jury were not required by the judge to consider whether the plaintiff had essentially varied the manner in which the light was enjoyed. His lordship further stated that he was not satisfied with the verdict, and thought it not justified by the evidence.

Under all these circumstances, we think the defendant entitled to a new trial. It is enough to say that *a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether ;*



and in this case some part even of the plaintiff's proof made it proper that the opinion of the jury should be taken on that subject.

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Rule absolute (a).

(a) And see *Darwin v. Upton*, 2 Wms. Saund. 175 n.; *Lewis v. Price*, Ibid., and Esp. Dig. N. P. C. 636; *Daniel v. North*, 11 East, 372; *Saunders v. Newman*, 1 Barn. & Alders. 258; *Barker v. Richardson*, 4 Barnw. & Alders. 579; *Hewlins v. Shippam*, 7 Dowl. & Ryl. 783, and 5 Barn. & Cressw. 221; *Bridges v. Blanchard*, ante, vol. iii. 691, and 1 Adol. & Ell. 536.

DOE d. MARY ANN JOHNSON v. BAYTRUP.

**EJECTMENT** for a house, garden and orchard, in the parish of Cocking, in the county of Sussex. At the trial before *Littledale, J.*, at the Sussex summer assizes, 1834, the plaintiff proved the following case:—*Johnson*, the husband of the lessor of the plaintiff, built the house in question upon land which had been previously in the possession of one *Underwood*, who exchanged it with Mr. *Poyntz* for other land. After the house was built, *Johnson* and his first wife lived in it for some time; then they separated, and *Johnson's* first wife lived in it until 1824. It was next occupied by two persons in succession, who paid rent to *Johnson*. He then returned to it, and lived there with his second wife, the lessor of the plaintiff, till his death in 1832. The lessor of the plaintiff lived in the house until November, 1832, when she went to reside about four miles off. *Johnson*, who was a tenant of Mr. *Poyntz*, of a farm, had agreed to accept a lease for three lives from him. Whilst this lease was in preparation, *Johnson* died, and a lease for three lives was subsequently granted by Mr. *Poyntz* to the lessor of the plaintiff. The defendant, who was a daughter of *Johnson's*, by his first wife, obtained possession of the premises in the following manner:—When the lessor of

A person who obtains possession by fraud, cannot dispute the title of those from whom he obtained possession, until he has restored the possession so obtained.

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the plaintiff quitted the house, she left the keys of the house and garden with one *Batscombe*, a neighbour, and caused a notice to be put up that the premises were to be let, and that *B.* would shew them. The defendant came to *B.*, requested the loan of the key, and said she wished to get some vegetables out of the garden. *B.* gave her the keys of the garden, to which the key of the house was attached. Upon this the defendant took possession of the house, and remained in possession of the premises until the day of the trial. The defence set up was, that the house was *Johnson's* property, and did not belong to Mr. *Poyntz*, under whom the lessor claimed; that no exchange had ever taken place between Mr. *Poyntz* and *Underwood*, and that the acceptance of the lease from Mr. *Poyntz* by the lessor of the plaintiff, was an attempt, on her part, to defraud the children of *Johnson* by his first wife. The learned judge left the question to the jury, whether Mr. *Poyntz* had a right to make the lease. After the learned judge had concluded his charge, it was submitted on the part of the plaintiff, that the attention of the jury should have been drawn to the *mode* in which the defendant obtained possession, and it was contended that the defendant could not dispute the lessor of the plaintiff's right to possession, when she had obtained possession from her by fraud. *Doe v. Dyson* (a) was cited. The jury found a verdict for the defendant, and in reply to a question by the learned judge, they stated that in their opinion the defendant had *fraudulently* obtained possession under the pretence of going to the garden to get vegetables. The learned judge gave leave to move to enter a verdict for the plaintiff. In Michaelmas term, 1834, *Thesiger* obtained a rule nisi accordingly.

*Platt* now shewed cause. If a party gets possession of his own goods by an unfounded representation, that gives the person in the wrongful possession of the goods no title

(a) 1 M. & M. 77.

to them. What difference can there be in principle, in this respect, between real and personal property? Here, Mrs. *Johnson* has wrongfully the possession. She deposits the keys, and the true owner gets possession. The jury were warranted in presuming collusion between Mr. *Poyntz* and Mrs. *Johnson*. This is not a case of landlord and tenant, and the party obtaining possession is not estopped from denying the other's title (a).

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*Thesiger*, contra. [*Patteson*, J. This point was decided in *Doe d. Bullen v. Mills* (b). The party sued is *not estopped*, but must give up the possession which has been fraudulently obtained, and he may then bring an ejectment.] There was a case of trover for title-deeds, where a party had obtained possession of the deeds by fraud, in which there was a similar decision.

LORD DENMAN, C. J.—It seems to me that this rule must be made absolute, for entering the verdict for the plaintiff. When one party obtains possession by *licence* from another, whether for a longer or a shorter period, or for any beneficial purpose to himself, he is thereby prevented from afterwards questioning the title of that other person in any action of this sort. As between those parties, (more particularly when the possession is obtained by means of a *fraud* which accident has given the party the opportunity of effecting,) the licence given prevents the person who improperly continues the possession, from defending that possession against the other party who let him in.

LITLEDAL, J.—I think the defendant having obtained possession under what the jury have considered a *fraud*, the lessor of the plaintiff has a right to claim to be put in the same situation as she was in when the possession was

(a) There was another question on the title, which was discussed, but which has been omitted, as the judgment of the Court had no reference to it.  
 (b) *Ante*, 25.

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taken. On that ground, the plaintiff is, in my opinion, entitled to have the verdict entered for him. His lessor has a right to be placed in the same situation that she was previously in, before she can be required to enter into the question of title.

PATTESON, J.—I have no doubt at all about the case of a landlord and tenant. That is decided by the cases of *Doe v. Smythe* (a) and *Doe v. Mills*. A tenant having been let into possession of land, cannot set up a title against the person who let him into possession, when the time is expired at which he ought to give it up. He must give up the possession to the person from whom he received it. Then if he has any right to the possession *aliunde*, he may bring his ejectment. In this case the defendant certainly claims a right to the property, and *may* have the right for any thing we know. If she had the right, she should have taken one of two courses. She should either have brought ejectment, or have made an entry on Mrs. Johnson and dis-seised (b) her. She takes neither of these courses. She fraudulently gets permission from the lessor of the plaintiff to be allowed to enter upon those premises, and then having got in under that permission, she turns round and claims a right to the possession. It cannot be contended that the same rule which applies between *landlord and tenant* ought not to apply to any person who comes in by the *permission* of the party actually in possession; and on that ground alone this case must be decided. Any other grounds would not suffice to make this rule absolute, to enter a verdict for the plaintiff, but the rule would be for a new trial.

COLERIDGE, J.—On the state of the facts presented to the Court now, it is not open to the parties to discuss the

(a) 4 Maule & Selw. 347.

(b) *i. e.* put an end to the actual seisin of Mrs. Johnson by such *lawful* entry. The word “dis-

seised” is not here used in its technical sense, as denoting a *wrongful* entry upon and ouster from the freehold.

question of title. We shall best promote the ends of justice by obliging the parties to discuss the question of title in a fair and regular way. It cannot be disputed for a moment that if the parties stood in the relation of landlord and tenant, the defendant could not, under the circumstances, dispute the title of the plaintiff. It has been said that there is a distinction between the case of landlord and tenant and that of licensor and licensee. I do not see on what principle there is any distinction. What does the person, who asks permission to enter, *admit* by the request? He admits that what he requests *may be refused*;—that it is in the power of the person in possession at the time, to stand on the possession, and give or refuse permission for him to enter. He concedes that there is some *title* in the person from whom he seeks for the possession. Let us try if there is any distinction, in another way. Suppose a possession is gained under that license, and that it is continued undisturbed for a considerable length of time, and the licensor brings an action for the use and occupation,—would it lie in the mouth of the licensee to dispute the title of the licensor, in *that* form of action? He would not be able to do it any more than the tenant in the ordinary case of landlord and tenant. The law would irresistibly imply a *tenancy* between the parties. If there is no distinction in law between the case of landlord and tenant and that of licensor and licensee,—do the circumstances here present a case in which the parties stand in the relation of licensor and licensee? The only conclusion that can be come to upon the facts, is, that the defendant entered under a licence. The lessor of the plaintiff is quietly in possession by her agent: The defendant borrows the keys, and having put herself in possession, claims title. If she meant to contend for the right, she ought to have taken possession in an open way. A party, instead of bringing an action of ejectment, may make an entry, and disseise (a) the other

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(a) *Vide supra*, 840.

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party, and then stand on the right. If a party chooses to have recourse to *this* way of obtaining possession, he is bound, before disputing the title, to put the other party in the same position in which he was before the fraud was practised. On this ground, I think that the rule for entering the verdict for the plaintiff should be made absolute.

Rule absolute.

CHITTY v. DENDY (in Error).

To debt in an inferior court, not of record, the defendant pleaded the general issue, and also, as by leave of the Court, a plea of set-off:—Held, that the latter plea was surplusage, and need not be noticed either by the plaintiff or the Court.

And therefore where, in such case, the plaintiff joined issue upon the first plea, and had a verdict and judgment thereon, this Court, upon a writ of false judgment, affirmed the judgment.

THE plaintiff below (*Dendy*) declared against the defendant below (*Chitty*), in the county court of Sussex, in debt on simple contract. The defendant below pleaded, first, *nil debet*, with a conclusion to the country; and, secondly, “for a further plea in that behalf, by leave of the Court, for that purpose first had and obtained, according to the form of the statute in such case made and provided,” a plea of set-off. The plaintiff below joined issue upon the plea of *nil debet*, but took no notice of the plea of set-off. The venire was awarded on the issue joined only, and upon that issue the jury found for the plaintiff below, who had judgment accordingly. The record having been brought up by virtue of a writ of false judgment, the case was argued in last term.

Blackburne, for the (now) plaintiff. It appears by the record that the plaintiff (below) did not in any manner notice the plea of set-off, and that no judgment was given upon that plea. He should either have demurred specially to this plea, or have replied to it. Assuming that the

A Court of Error will take judicial notice that a county court cannot give leave to plead double.

The rule that duplicity in pleading must be taken advantage of by special demurrer, does not apply to the case of two distinct pleas, pleaded without leave.

The statute of 32 H. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to Courts of record.

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county court cannot give leave to plead two pleas to the whole or to the same part of a declaration, (the statute of *Anne*(a) not extending to inferior courts not of record,) the defect can be taken advantage of by way of special demurrer only. In *Com. Dig.* tit. Pleader, (E. 2,) it is laid down that "a double plea is aided upon *general* demurrer, and therefore there must be a *special* demurrer to it." The question here is, not whether the two pleas were pleadable in the Court below, but whether, having been pleaded, the plaintiff (below) had a right to *select* one and treat the other as a nullity. It is submitted that he had no such right. Upon this record it appears that an issue was tendered, upon which nothing whatever was subsequently done.

Chilton, contra. Both the plaintiff (below) and the Court were warranted in treating the plea as a nullity. This case is quite distinguishable from the old case of pleading *one* double plea, in which it may be admitted to be the proper course to demur specially. Here are *two* distinct pleas, of which the second purports to be pleaded by leave of the Court. The Court had no authority to give such leave, as the statute of *Anne* does not extend to any but Courts of record; and therefore it cannot be said to be error to treat such plea as an absolute nullity. In an action in *this* Court, if two pleas had been pleaded *without* leave, the plaintiff might have treated *both* as a nullity, and have signed judgment. [*Littledale*, J. I think you mistake the practice. I apprehend that the plaintiff could not of himself treat as a nullity two pleas pleaded without leave. Are you prepared with any case occurring before the new rules, in which that has been so held. That is the case now under the new rule (b).] That appears to have been the practice in the Court of King's Bench, though in the Common Pleas it was otherwise. The plaintiff (below) was at all events warranted in passing over *one* of the pleas as a nullity.

(a) 4 & 5 *Ann.* c. 16.(b) II. 2 *Will.* 4, Reg. 34.

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Blackburne, in reply. The making of the new rule which has been referred to, is a strong circumstance to shew that the practice had not been to treat a second plea, pleaded without leave, as a nullity. But assuming that the plaintiff (below) might at one time have signed judgment, he has, by going down to trial, lost this advantage. The proper course however was to demur specially, as appears from the passage in *Com. Dig.* The rule must be the same whether the duplicity in pleading be by two distinct pleas, where two pleas are not allowable, or by one double plea, as the effect is in the two cases precisely the same. [*Lit- tledale, J.* Was there not a discontinuance of the action by the plaintiff? In *Com. Dig. Pleading*, tit. Discontinuance, it is said, "If a plea or replication does not answer the whole matter of the bar or declaration, it will be a discontinuance for the whole." It is also stated, that by stat. 32 *Hen. 8*, c. 30, a discontinuance is aided by verdict; but upon looking at the statute, it appears that this aiding by the verdict applies only to discontinuances of actions in *Courts of record*.]

Cur. adv. vult.

In this term the judgment of the Court was delivered by Lord DENMAN, C. J., as follows:—It is a rule in pleading that a plea must not be double; but then the plaintiff must demur to the plea, if he means to object to it on the ground of duplicity. If, however, he does not demur, he ought to reply to the whole plea, and cannot leave one part unanswered, because it is uncertain what part of the plea the defendant means to rely upon. And it is also a rule in pleading, that if the plaintiff does not answer the whole of the plea, it amounts to a discontinuance of the action on his part; but then if the action is discontinued, such discontinuance is cured by verdict, under the provisions of 32 *Hen. 8*, c. 30. That statute, however, only extends to courts of record, and therefore the county court is not affected by it; and consequently a disconti-

nance in the present case would not be cured by verdict.

The rule which requires the plaintiff to demur to the plea, if it be double, appears to apply only to cases where it is pleaded as one plea. In this case, the general issue and set-off are not pleaded as one plea (*a*), but they are distinctly pleaded as two pleas, and the second plea is stated to be pleaded by leave of the Court, according to the form of the statute. But the county court, not being a Court of record, has no authority, in point of law, to give leave to plead several pleas, the statute 4 & 5 Ann. c. 16, being confined to Courts *of record*. The plaintiff below therefore was not bound to take any notice of such a plea; and it cannot be said that it was not known which plea the defendant meant to rely upon; for the defendant pleaded the general issue, and thereby took an issue to the country. The plaintiff therefore had a right to consider that as a complete plea, upon which he might join issue.

A Court of Error will take judicial notice that the county court has no authority to give leave to plead double; and where a complete plea had been before pleaded, they will consider the second plea as mere surplusage. We are therefore of opinion that there is no error or false judgment in the Court below, and that the judgment of that Court must be affirmed.

Judgment affirmed.

(*a*) It appears to follow, from what is here laid down, that if the double defence in this case had been embodied in that which purported to be, and which was in

point of form, *one* plea, the action would, notwithstanding the verdict, have been held to have been discontinued, and the judgment would have been reversed.

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Where a plaintiff recovers a sum less than the amount for which he arrested and held the defendant to bail, and it appears that his only probable cause of action was not bailable, (being for unliquidated damages,) the defendant is entitled to costs under 43 *Geo. 3*, c. 46, s. 3.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would construct a certain pneumatic engine, and other machinery, for reasonable reward, the defendant promised to accept the same engine &c. on delivery,—that the plaintiff did construct such engine &c. for the defendant, upon the terms aforesaid,—that the same was reasonably worth 126*l.*,—that the defendant was requested to accept and fetch away the engine &c. and to pay the 126*l.*,—that he paid 40*l.* on account, but refused to accept and fetch away the said engine &c., or to pay the residue of the 126*l.*,—and that there is now due to the plaintiff 86*l.* The declaration also contained indebitatus counts for work and labour &c., done, performed, and bestowed, and materials provided for, and used and applied in and about, the making a pneumatic engine and other machinery; and for goods sold, for money paid, and on an account stated.

Pleas: to the first count, non assumpsit.

As to so much of the declaration as alleges the defendant to have been indebted to the plaintiff for work and labour &c. so far as the same relates to the pneumatic engine, a special agreement to make the engine for 45*l.*, or thereabouts, and to deliver it upon payment of that sum, and a tender by the defendant to the plaintiff of the residue of such price, to wit, the further sum of 10*l.*, the same then being a sufficient sum in that behalf; and a request thereupon to deliver such engine, which was refused.

As to so much of the declaration as alleges the defendant to have been indebted to the plaintiff for work and labour &c., as far as the same relates to the said other machinery, a promise to make such machinery for so much money as the plaintiff should reasonably deserve in that behalf, and a tender by the defendant of 16*l.* 10*s.*, being as much as the plaintiff reasonably deserved to have.

As to the residue of the declaration, non assumpsit.

The replication traversed the special agreement in the second plea, and the sufficiency of the tender of 16*l.* 10*s.* alleged in the third plea.

At the trial before *Patteson, J.*, at the sittings for Middlesex, in last Hilary term, it appeared that the plaintiff claimed 88*l.* 14*s.* 9*d.* for making the pneumatic engine, and 5*l.* 5*s.* for drawings and calculations, and 32*l.* 6*s.* 6*d.* for other machinery. Credit was given by him for 40*l.* The defendant, in support of the second plea, proved representations by the plaintiff that the engine would not cost more than 45*l.* or thereabouts,—and the plaintiff proved that he had himself expended a much larger sum in wages and materials, and that a part of the expense had been incurred owing to the defendant's having suggested certain alterations in the course of the construction of the engine. The defendant also called witnesses, who stated that the engine might be had for 45*l.*, and that the alleged alterations might be made for 10*l.*; and as to the other machinery, evidence of the value was given. The learned judge directed the jury to consider whether the plaintiff had contracted to make the engine for a specific sum, and told them that if they thought the special contract not proved, they must find for the plaintiff in respect of the engine, but that, in ascertaining the amount of damages, they should deduct the 40*l.* paid on account, and also the present value of the engine. His lordship directed them also to consider, whether the 16*l.* 10*s.* tendered by the defendant for the other machinery, was sufficient.

The jury negatived the special contract with respect to the pneumatic engine, and gave a verdict for the plaintiff, damages 15*l.* With regard to the other machinery, they found that the sum of 16*l.* 10*s.*, mentioned in the third plea, was a sufficient sum. A verdict was entered, by the direction of the judge, for the plaintiff, upon the first and second issues, with 15*l.* damages, and for the defendant upon the third and fourth issues.

Upon affidavits stating these facts, and also that the

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defendant had been arrested and held to bail for 86*l.*, upon an affidavit of debt for goods sold and delivered, *Follett*, S. G., in the same term, obtained a rule to shew cause why the defendant should not be allowed his costs, pursuant to 43 *Geo. 3*, c. 46, s. 3.

The plaintiff, in his affidavit in answer, stated that the wages, value of materials, and wear of tools, amounted to about 96*l.*, and that at the time of the arrest he believed that he had reasonable ground to arrest for the sum of 86*l.*

Sir *F. Pollock* and *T. Peake* shewed cause. It is incumbent on the defendant to make out to the satisfaction of the Court, that the plaintiff had no *reasonable or probable cause* to arrest for 86*l.*, and it is not sufficient to shew that a *verdict* is found for a smaller sum. Here, the arrest was for 86*l.*; and if from this sum there be deducted the 16*l.* 10*s.* tendered, and the 15*l.* awarded, there remains a balance of 54*l.* 10*s.*, which it is not extravagant to estimate as the value of the engine remaining in the plaintiff's hands. The jury found that no *contract* to make the engine for a specific sum was entered into; and it appears that the plaintiff actually expended such a proportion of the 126*l.*, as left no more than a reasonable sum for profit. [*Patteson*, J. The verdict went upon a count for *unliquidated damages*, upon which the plaintiff had no right to arrest at all.] The defendant's remedy in that case must be an action for a malicious arrest. The act of parliament is not intended to apply to cases where there is no authority to arrest at all, but only to cases where the ground of complaint is that the plaintiff has arrested for an excessive amount. [*Patteson*, J. If a plaintiff chooses to arrest a defendant, he ought to *declare* accordingly. The second count, which is for work and labour, ought not to have been there. *Littledale*, J. Suppose a man had a distinct cause of action for 100*l.*, for work and labour, and also a bill for 100*l.*, and having doubts as to the first claim, arrests upon the bill of exchange only; and that at the trial he

fails on the bill of exchange and recovers the 100*l.* for work and labour, what then would be the effect of the statute ?] It is submitted that it is sufficient that the plaintiff had reasonable and probable cause to arrest for the *amount*, and that it is not necessary that he should have arrested upon the same *cause of action* for which he recovered. The fact of a plaintiff's having, through mistake as to the legal nature of his cause of action, arrested on a wrong ground, though for a right amount, does not make the arrest to be *without reasonable or probable cause*. If there is no ground of arrest at all, the defendant may apply to a judge to be discharged, or he may bring his action. This defendant did apply to be discharged, and the judge refused the application. The Court will look to see what was the *bonâ fide* impression upon the plaintiff's mind. This case is not like that of *Nicholas v. Hayter*(*a*), in which the plaintiff *knew*, that owing to the death of one witness and the absence of another, he had no means of substantiating his claim.

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Sir *W. Follett*, *contrâ*, was stopped by the Court.

LORD DENMAN, C. J.—This rule has been obtained in a case in which the plaintiff has not recovered the amount of the sum for which he arrested and held the defendant to bail; and therefore the defendant is entitled to costs under 43 *Geo. 3*, c. 46, s. 3, unless we see that he had reasonable or probable cause to hold to bail for that amount. So far are we from seeing that such was the case, that we think that he had no cause to arrest the defendant at all, as the action was for unliquidated damages.

PATTESON, J.—It certainly lies on the defendant to shew that the reasonable and probable cause of arrest, for the amount for which he was held to bail, was wanting. We

(*a*) A report of this case, which was decided in last Michaelmas term, will be found *post*, 882.

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must look at both the affidavits and the evidence at the trial. Here, it is perfectly clear that this plaintiff had no reasonable or probable cause to arrest for 86*l*. Although there was no specific contract to make the engine for 45*l*., yet it was clearly shewn upon the evidence, that the plaintiff represented to the defendant that the cost would not exceed 45*l*. or thereabouts. After this, even though the engine had actually cost the plaintiff the whole money charged, he having received 40*l*. on account, and having the engine in his hand, it is impossible to say that he had reasonable or probable cause to arrest for 86*l*.

COLERIDGE, J.—I entirely concur. The affidavit of debt was for 86*l*., for goods sold and delivered. At the trial the plaintiff does not recover on this ground, but on a count for damages, for not taking the engine. It seemed to be considered in one part of the argument for the plaintiff, that the defendant was bound to shew *malice*; but this has been decided, upon the words of the statute, to be unnecessary(*a*).

Rule absolute.

(*a*) *Donlan v. Brett*, 5 Mann. & Ryl. 29, and 10 Barn. & Cressw. 117.

REX v. YOUNGHUSBAND.

Upon a motion for a criminal information against *A.* for challenging *B.*, an affidavit, stating

SIR W. FOLLETT moved for a criminal information against Captain *Younghusband*, for challenging a person of the name of *Jenkyns*. It appeared upon the affidavit of *Jenkyns* that there were certain unsettled accounts between that in a correspondence between them *A.* had intimated an intention, after the settlement of accounts between himself and *B.*, to require an apology for offensive expressions contained in a letter received by him from *B.*, or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards *C.*, a relation of *A.*, came with a letter of *B.* in his hand,—settled the account by paying a balance due from *A.* to *B.*,—and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from *A.*:—was held insufficient to connect *A.* with the challenge; and therefore the Court refused the rule.

But the Court granted a rule nisi against *C.*

Jenkyns and *Younghusband*, which had been the subject of a correspondence between them. In one letter from *Younghusband* to *Jenkyns*, the former acknowledged the receipt of a letter from *Jenkyns*, and in allusion to part of that letter wrote to this effect:—"I do not intend further to allude to the offensive expressions contained in your letter, until after the settlement of our accounts; but I beg to say that I never intentionally insulted another, nor ever received an insult without requiring an apology, or that satisfaction which is usual on such occasions between gentlemen." *Jenkyns* in reply stated, that his rule also was never intentionally to insult another, that he did not mean to insult him (*Younghusband*), and hoped that he (*Younghusband*) would not insult him. Almost immediately afterwards, Captain *Thomas Younghusband*, a nephew of Captain *Younghusband*, called on *Jenkyns*,—settled the account between Captain *Younghusband* and *Jenkyns* by paying the balance due to *Jenkyns*,—and then, having in his hand a letter of *Jenkyns's*, which *Jenkyns* supposed to be the letter alluded to as containing the offensive expressions, said that he came on the part of Captain *Younghusband* in consequence of the receipt of that letter. He also, in answer to an inquiry whether he had seen the correspondence between Captain *Younghusband* and *Jenkyns*, said that he had. *Jenkyns* then said that he had quite made up his mind how to proceed if any hostile message were delivered. Captain *Thomas Younghusband* then wrote on a paper words purporting to be a hostile message from Captain *Younghusband*. There was nothing beyond the facts stated, to connect the message with Captain *Younghusband*.

LORD DENMAN, C. J.—We think that the evidence falls short of what we ought to require before we grant a rule for a criminal information.

Rule refused.

Sir *W. Follett* then applied for a rule against Captain

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Thomas Younghusband as the party who brought the message.

Lord DENMAN, C. J.—We think that you may have that rule.

Rule nisi accordingly.

POWELLER v. LOCK.

Held, that where a sheriff obtains a rule under the Interpleader Act, calling upon an execution creditor and a third party who claims goods seized by the sheriff under a *fi. fa.*, to appear and state the nature of their claims; such third party must appear and state, *by affidavit*, the nature of his claim.

BUTT, on behalf of a sheriff, obtained a rule calling upon the plaintiff and one *Hannah Burton*, to appear and state their claims to the goods which had been seized as the goods of the defendant, by the sheriff under a *fi. fa.* issued by the plaintiff, and which had been claimed by *Hannah Burton*.

Tomlinson appeared for the plaintiff, and objected that there was no *affidavit* by the claimant to shew a probable ground of claim, and that, therefore, the Court could not grant an issue, or entertain the claim.

Rogers, for the claimant. It appears by the sheriff's rule that *Hannah Burton* has made a claim, and this is sufficient within the statute (1 & 2 W. 4, c. 58, s. 6,) to authorize and require the Court to direct an issue. If the nature of the claim had been stated now, upon *affidavit*, the Court could not try the merits of it upon those *affidavits*. *Bramidge v. Adshead* (a). The language of the sixth section of the Interpleader Act is, that "it shall be lawful for the Court, upon application by the sheriff, or other officer, to call before them, by rule of Court, as well the party issuing such process, as the party making such claim, and thereupon to exercise for the adjustment of such claims, (that is, the claims made to the sheriff,) and the relief and protection of such sheriff or other officer, all or any of the

powers and authorities hereinbefore contained, and make such rule and decisions as shall appear to be just, according to the circumstances of the case." The claim referred to throughout this enactment is, the claim presented to the sheriff. [*Littledale, J.* What are the "powers and authorities" referred to in that section?] They are those which are contained in the first section. [*Littledale, J.* Then the party must appear and *state the nature of his claim*. Surely the party must do that upon affidavit. The Court ought to be informed by affidavit of the nature of the claim, and not be asked to take the mere verbal statement of counsel. *Coleridge, J.* You appear for *Hannah Burton*, who is called upon to appear and state the nature of her claim. The third section says that you shall be barred unless you do so.] The words of the third section are, that, "if such third party *shall not appear* upon such rule, to maintain or relinquish his claim, being duly served therewith," he shall be barred. The claimant in this case *does*, by her counsel, *appear upon the rule to maintain* her claim.

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If the Court are of opinion that the claimant must state the nature of her claim by affidavit, it is prayed that she may be allowed to do so before a judge at chambers (a).

LORD DENMAN, C. J.—There appears to have been a misconception of the act. We think that you may have time to appear by affidavit:—Cause to be shown at chambers in a week.

Rule accordingly.

(a) This case was heard on the last day but one of the term.



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DONLAN v. BRETT (a).

After declaration, and before plea, a cause and all matters in difference between the parties, were, by a judge's order, made by consent, referred to arbitration, the costs to abide the event of the suit. The arbitrator awarded that a verdict should be entered for the plaintiff with 55*l.* damages; and that in all the matters in difference between the parties, there was not any sum of money due to either of the parties: Held, that this was not equivalent to an award that the plaintiff should pay the defendant 55*l.*; and the Court therefore refused an attachment to enforce the payment either of the 55*l.* or of the costs.

BY an order of Lord *Tenterden*, C.J., made upon consent 8th May, 1832, and which was subsequently made a rule of Court, this cause, and all matters in difference between the parties, were referred to the arbitration of a barrister; and it was ordered that the costs of the suit should abide the event of the award, and the costs of the reference be in the discretion of the arbitrator. This order was made after the declaration had been delivered, but before plea pleaded. On the 29th of December, 1832, the arbitrator made his award in the following terms: "I do award, order, and direct, that a verdict be entered for the plaintiff with 55*l.* damages; and I further award, order, and direct, that in all the matters in difference between the parties brought before me, there is not any sum of money due to either of the parties. I do further award, order, and direct, that each party shall pay his own costs and expenses of this reference, and that each party shall pay a moiety of the expenses of this award." The plaintiff taxed his costs, and demanded of the defendant the sum of 55*l.* mentioned in the award, and also 26*l.* 3*s.* 6*d.*, the amount of the taxed costs, which sums the defendant neglected to pay.

In Trinity term, 1834, *Justice* obtained a rule calling upon the defendant to shew cause why a writ of attachment should not issue against him for his contempt in not paying the said sums of 55*l.* and 26*l.* 3*s.* 6*d.*; against which, in last Michaelmas term,

Channell shewed cause. The award is bad. The order of reference was made before trial, and no power is given to the arbitrator by the order, to direct a verdict to be entered; and therefore he had no authority to award as he has done. In *Hutchinson v. Blackwell* (b), after the cause was at issue, and the jury process issued, and the venire

(a) This case was decided in last Michaelmas term.

(b) 8 Bingh. 331; 1 Moore & Scott, 513.

returned by the sheriff, but before the cause had been entered for trial, the cause "and the subject-matter thereof, and the issue thereon, and the costs of such action," were, by an order, made upon consent, referred to the determination of a barrister. The arbitrator ordered a *verdict* to be entered for the plaintiff for a certain sum of money; and the Court of Common Pleas held that the arbitrator had no authority to direct a verdict to be entered. It will be contended by the plaintiff, that the direction is equivalent to an award by the arbitrator that 55*l.* is *due* from the defendant to the plaintiff, and should be *paid* by the former to the latter; and that therefore the plaintiff is entitled to that sum, and to the costs of the suit. *Cartwright v. Blackworth* (a) is undoubtedly an authority for the argument of the plaintiff. But the precise terms of the award are not set out in the report of that case, and the attention of *Littledale, J.*, who alone decided that case, was not directed either to *Hutchinson v. Blackwell* or *Jackson v. Clarke* (b). In the latter case, after declaration, and before plea pleaded, all matters in difference in the suit were referred to arbitration: The arbitrator awarded that a verdict be entered for the plaintiff, with a certain sum for damages; and the Court of Exchequer held that the arbitrator had exceeded his authority. *Jackson v. Clarke* is therefore directly opposed to *Cartwright v. Blackworth*. In *Edgell v. Dullimore* (c), the award found a debt to be due, but contained no order to pay; and the Court of Common Pleas refused to grant an attachment for non-payment of the debt. It may be contended that the plaintiff is at all events entitled to the costs. But they are to abide the event of the suit, which has not been determined. The direction to enter a verdict cannot amount to an order to *pay* the costs.

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Justice, contra. Whatever may have been the practice

(a) 1 Dowl. P. C. 489.

(b) M'Clel. & Y. 200.

(c) 11 B. Moore, 541; S. C. 3

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formerly, the Courts will now endeavour, if possible, to give effect to awards in order to put an end to litigation ; and for this purpose, every intendment will be made in favour of the legality of an award. Of this *Doe d. Williams v. Richardson* (a) is an illustration. It was expressly said by *Dallas*, C. J. in that case, that the Court are to intend every thing in favour of an award. Although the arbitrator in this case does not in express terms award that 55*l.* shall be paid by the defendant to the plaintiff, yet he awards that which is equivalent to it, and which is in effect the same, when he directs that a *verdict* shall be entered for the plaintiff for that sum. It is not necessary that an award should be in precise and technical terms ; but it is sufficient if it can be seen what the *intention* of the arbitrator was. It is not to be supposed that when the arbitrator directs a verdict to be entered for the plaintiff for a certain sum, that he does not intend that the defendant shall *pay* that sum. In *Jackson v. Clarke*, the argument, that the language of the award was equivalent to an order of payment, was not used. In *Edgell v. Dallimore* the award merely found a debt due, which might reasonably be held *not* to be equivalent to an order to pay. In *Hutchinson v. Blackwell* the motion was to enter a verdict. *Cartwright v. Blackworth* is precisely in point.

The plaintiff is entitled to his costs. In *The Highgate Archway Company v. Nash* (b), the cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event. The arbitrator directed a verdict to be entered for the plaintiffs, but that they should not take out execution for the debt, until they had paid a larger sum to the defendant. This Court held that the plaintiff's attorney might still take out execution for the costs. [*Taunton*, J. That turned on a point totally different from this. You misconceive the objection. The objection is this, that there being no issue joined, the arbitrator had no power to order a *verdict* to be entered for the plaintiff.]

(a) 8 Taunt. 697. (b) 2 Barn. & Alders. 597 ; S. C. 1 Chit. Rep. 325.

Lord DENMAN, C. J.—We think it would be of advantage to see my brother *Littledale*.

Cur. adv. vult.

Lord DENMAN, C. J., on a subsequent day in the same term, delivered the judgment of the Court.

After stating the facts of the case his lordship said,—It was contended on the argument, that the arbitrator's awarding a *verdict* to be entered for the plaintiff for 55*l.* damages, was equivalent to awarding that that sum of money should be *paid* by the defendant to the plaintiff. There is a late case of *Jackson v. Clarke* in which the contrary was held by the Court of Exchequer. We have conferred with my brother *Littledale*, and we think that this rule ought to be discharged. My brother *Littledale* agrees in opinion with the rest of the Court; and he says that he thinks he should have decided *Cartwright v. Blackworth* otherwise, had his attention been directed to the case in the Exchequer.

Rule discharged.

DOE, on the demise of JOSEPH L. SHELTON and others, v.
BROWN SHELTON.

EJECTMENT for copyhold lands of inheritance within and parcel of the manor of Bromyard-and-Bromyard-Foreign.

At the trial before *Tindal*, C. J., at the Herefordshire Summer Assizes 1833, a verdict was found for the plaintiff, subject to the following case :

11th April, 1749. *Anthony Kerry* being seised in fee according to the custom of the manor, surrendered to the use of himself, *James Lane*, and *Elizabeth* his wife, (daughter of *Kerry*,) successively, and after their deceases, to the heirs

By the custom of a manor, a surrender by the wife is inoperative unless the husband consent, and such consent be expressed in the surrender and admittance. A surrender made by a wife during

coverture, and without the consent of the husband being expressed on the face of the surrender, will not be presumed to be made with his consent, against a person who does not claim under the surrender, even where the husband has no beneficial interest what-over in the property surrendered.

A party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived.

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of the body of *Elizabeth* by *James Lane*. On the same day *Kerry* was admitted tenant of the premises.

1759. *Elizabeth Lane* died, leaving issue by *James Lane*, two daughters, *Mary* and *Elizabeth*: Whereupon the estate tail vested in *Mary*, who, as the eldest daughter, was by the custom of the manor the sole heir of her mother.

1769. *Mary Lane* married *Brown Shelton*, the elder, by whom she had issue 1, *Brown Shelton*, jun., the defendant,—2, *James Lane Shelton*,—3, *Mary Maria Shelton*,—and 4, *Joseph Shelton*, the father of *Joseph L. L. Shelton*, one of the lessors of the plaintiff.

1770. *A. Kerry* died.

The plaintiff put in a deed dated 26th January, 1796, purporting to be made between *Thomas Wood* of the first part, *Richard Jones* of the second part, the said *James Lane* of the third part, *Mary*, the wife of *Brown Shelton* the elder, of the fourth part, *William Hyde* of the fifth part, and *Brown Shelton* the younger of the sixth part; which recited, that by a settlement in 1773, made soon after the marriage of *Brown Shelton* the elder and *Mary* his wife, and also under divers proceedings, conveyances, and assurances, had, made, done, and executed under a commission of bankrupt, dated 8th January, 1781, issued against the said *Brown Shelton* the elder, a certain estate at Eastham had been conveyed to the said *Thomas Wood* and *Benjamin Taylor* deceased, and their heirs, during the life of *Brown Shelton* the elder, in trust for the separate use of *Mary* the wife of the said *Brown Shelton*, remainder to the said *Mary* for her life, remainder to their issue in tail male, with divers remainders over. And after further reciting that it was intended that a common recovery should be suffered, wherein the said *James Lane* should be demandant and *Richard Burneby* tenant, and *Brown Shelton*, jun. vouchee, the premises were conveyed to *Brown Shelton*, jun. for the purpose of enabling him to convey the same to the said *Richard Barneby*, in order to make him a good tenant

to the præcipe. This deed was executed by all the parties except *Brown Shelton*, jun.

9th February, 1796. By indenture of release between *Brown Shelton*, jun. of the first part, *Richard Barneby* of the second part, *James Lane* of the third part, *Mary*, wife of *Brown Shelton*, sen. of the fourth part, and *Richard Jones* of the fifth part, it was witnessed, that for the barring of all estates-tail and remainders over, *Brown Shelton*, jun. conveyed the premises at Eastham unto *Richard Barneby*, with the intent to make him a good tenant of the freehold in order for suffering a common recovery, in which *James Lane* should be demandant, *Richard Barneby* tenant, and *Brown Shelton*, jun. vouchee. The uses of the recovery were declared to be for the separate use of *Mary*, wife of *Brown Shelton*, sen., for her life, remainder to *Brown Shelton*, jun. in fee. This deed was executed by the defendant (*Brown Shelton*, jun.) and *Richard Barneby* only.

These deeds were offered in evidence to prove that an estate at Eastham had been settled upon the marriage, and also that *Brown Shelton*, sen. was declared a bankrupt in January 1781; but their admissibility was objected to on the part of the defendant. The Chief Justice received them in evidence, subject to the opinion of this Court.

The plaintiff put in a copy of court-roll, dated 22d April, 1782, whereby it was stated that at the Court came *Brown Shelton*, senior, by *William Hyde* and *Richard Jones*, his assignees duly appointed, and *Mary*, wife of the said *Brown Shelton*, customary tenants of the said manor, (the said *Mary* having been first privately examined apart from her said husband by the steward, and freely consenting,) and surrendered the premises in question expectant on the death of *James Lane*, (who was stated to have a life interest in the premises,) to the use of *Thomas Wood* and his heirs during the joint lives of the said *Brown Shelton* and of *Mary* his wife, who was stated therein to have a life interest in the premises if she survived *James Lane*; and at the same Court *Thomas Wood* was admitted tenant, under the sur-

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render, for the joint lives of *Brown Shelton* and his wife, expectant upon the death of the said *James Lane*.

If the husband consents to a surrender, it is the custom in the manor that such consent shall be expressed in the surrender and admission, and without his consent the surrender is wholly inoperative; and by the custom, the husband takes no interest after his wife's decease as tenant by the curtesy. By the custom of the manor, a surrender may be made by attorney duly appointed; and when a surrender is so made, it is always mentioned in the surrender that it was made by the attorney duly appointed.

14th August, 1781. By indenture of release made between *James Lane*, *Richard Jones*, and *William Hyde*, *James Lane* conveyed certain freehold estates to *Richard Jones* and *William Hyde*, in trust for himself during his life, and on his decease to pay to *Mary Shelton*, (his daughter,) or permit and suffer her to receive the rents thereof for her sole and separate use during her life, independently of the control of *Brown Shelton* her husband; and by the same indenture, after reciting that a commission of bankrupt had issued against *Brown Shelton*, and that his assignees had put up for sale by auction his copyhold premises, and that *Thomas Wood* had been the highest bidder for the same, and was declared the purchaser, but had purchased the same with the money of *James Lane*, and in trust for him, *Wood* covenanted to stand seised of the premises after the decease of *James Lane*, and during the joint lives of *Brown Shelton* the elder and *Mary* his wife, upon trust to permit the said *Mary* to receive the rents thereof for her sole and separate use, independently of the control of *Brown Shelton* her husband. Neither *Brown Shelton* the father, nor the defendant, was a party to the last deed.

By the custom of this manor, an entail may be barred by surrender.

January, 1803. *James Lane*, the surviving tenant for life under the surrender of 1749, died.

3d May, 1803. *Mary Shelton*, together with *Thomas*



*Wood*, attended the customary court of the manor; and by an alleged copy of court roll, part of which was in the hand-writing of the then steward, and was also signed by him, produced on the part of the plaintiff, it was stated, that at a court held on that day, *Mary Shelton*, wife of *Brown Shelton*, and *Thomas Wood*, two of the customary tenants of the said manor, (the said *Mary* having been privately examined by the steward aforesaid and freely consenting,) surrendered the premises in question to the use of *Thomas Wood*, his trustees or heirs for ever, according to the custom of the manor, but in trust for such person or persons, and for such estate or estates, as *Mary Shelton*, in the manner therein expressed, should appoint; and in default thereof, and subject thereto, in trust to pay the rents of the said premises into the proper hands of *Mary Shelton*, or to permit her to receive the same to her sole and separate use during her life; and after her decease, in trust for *Brown Shelton*, jun. and *James Lane Shelton*, sons of the said *Mary Shelton*, in equal shares, as tenants in common respectively for ever: and that *Thomas Wood*, being present in Court, prayed to be admitted to the premises so surrendered to his use, upon and subject to the said trusts; to whom the lord by his said steward granted the same premises accordingly.

The Court at which such surrender and admission was made, was held at some inn at Bromyard. It was a general and not a special Court; it lasted many hours, and a great number of persons attended it, so that sometimes the rooms were quite full. It was found as a fact by the jury, that *Brown Shelton* the elder was present at that Court. The original court roll was produced, which contains the following entry, and no other, applicable to the last-mentioned surrender: "At this Court came *Mary* the wife of *Brown Shelton*." To that entry is annexed the following, which was not made at the time, but subsequent to the year 1825, "See Minute Book, proceedings of a Court held for this manor not entered on the roll." The Minute Book of the

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steward, with reference to the proceedings at the Court held on the 3d May, 1803, contains the following entry:—  
 “Manor of Bromyard and Bromyard-Foreign. At a Court there held the second of May, 1803, before *William Griffiths*.” (Then follows the name of the jury and the homage.) “At this Court came *Mary Shelton*, wife of *Brown Shelton*, (the said *Mary* having been first privately examined by the steward aforesaid and freely consenting,) and *Thomas Wood*, customary tenants of this manor, and surrendered all those two messuages, (as in *Mr. Price’s* draft surrender, &c.)”

In the margin of the same book was, inter alia, the following entry:—“Private examination, 6s. 8d.”

*Thomas Wood* was admitted tenant of the premises in fee the same day, and has since died, leaving *Thomas Wood Roberts*, one of the lessors of the plaintiff, his heir at law. *Mary Shelton* had lived separate and apart from her husband for many years previously to the death of *James Lane*, and never lived with him again. She resided on the copyhold property until her death in 1821.

The questions for the opinion of the Court are, first, whether the deeds of 26th January, 1796, and 9th February, 1796, were admissible to prove the bankruptcy of *Brown Shelton* the elder, and the settlement of the *Eastham* estate; and, secondly, whether, under all the facts of the case, the plaintiff is entitled to recover?

This case was argued in Hilary term, 1835.

*Follett*, S. G., for the plaintiff, contended that it was not necessary by the custom, that the consent of the husband should be expressed on the face of the surrender, and that all that was necessary was, that the husband should in fact consent, and that the statement in the case that it was the custom that the husband’s consent should be expressed in the surrender, merely meant that it was the practice of the steward so to express the husband’s consent.

*Maule*, who was counsel for the defendant, denied that this was the meaning of the statement in the case.

*Follett* then applied for leave to amend the case in this respect, by the judge's notes.

*Maule* urged that this ought not to be done, as the case would be evidence against the parties. For this he cited *Van Wart v. Wolley* (a).

The COURT refused to permit the case to be amended.

*Follett* then proceeded with his argument, which is sufficiently noticed in the elaborate judgment of the Court. The following authorities were cited for the plaintiff—*Watkins on Copyholds*, p. 64; *Compton v. Collinson* (b); *Stevens v. Tyrrell* (c); *Scamon v. Maw* (d).

*Maule* argued for the defendant.

*Cur. adv. vult.*

LORD DENMAN, C. J., in the course of Easter term, delivered the judgment of the Court, as follows:—This was an action of ejectment, brought on the demise of (amongst others) *T. Wood Roberts*, customary heir of *T. Wood*, for certain copyhold tenements, to which *T. Wood* had been admitted on a surrender from *Mary*, the wife of *Brown Shelton*, in 1803. A verdict was taken for the plaintiff, (the title of his lessor depending on the validity of that surrender,) subject to the opinion of this Court on the following state of facts:

*John Lane* was seised in fee of these tenements. His daughter, the said *Mary*, was married to *B. S.* in 1769. The defendant was the eldest son of that marriage. A copy

(a) Mood. & Malk. 520.

(b) 1 H. Black. 334; S. C. 2 Bro. C. C. 377.

(c) 2 Wilson's Rep. 1.

(d) 3 Bingh. 378; 11 Moore, 243.

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of court roll was put in, of the year 1782, in these terms, [his lordship here read the copy of court roll, which see *ante*, 861,] and *T. W.* was admitted tenant accordingly.

By an indenture of release in 1783, reciting that a commission of bankrupt had been duly awarded against *B. Shelton*, and that *Wood* had become the purchaser of the premises in question, as the highest bidder, at a sale directed by his assignees, but that he had purchased the same with the money of *James Lane* and in trust for him, *T. W.* covenanted to stand seised of the same after *J. L.*'s decease, and during the joint lives of *B. S.* and his wife, in trust for the sole and separate use of the said wife, and independently of her husband's control.

Neither *B. S.* nor *B. S.* the younger, the defendant, were parties to this release.

Evidence was given (but subject to a question as to its admissibility) of two deeds, bearing date in January and February, 1796. The former of these, after reciting [his lordship here read the recital, which see *ante*, 858,] conveyed the premises to the defendant, for the purpose of enabling him to make a tenant to the præcipe. The defendant did not execute that release, but executed the deed in February, and thereby conveyed those premises to the tenant to the præcipe. The uses of the recovery were declared to be for the sole and separate use of *Mary*, the wife of *B. S.*, for life, remainder to the defendant in fee. This latter deed, however, contained no recital respecting *B. S.*'s bankruptcy.

The next document was the surrender on which the title rested, made after the death of *James Lane*, by *Mary* the wife of *B. S.*, but not expressing in the surrender, the husband's consent.

The case set forth two customs of the manor. 1. If the husband consents to a surrender, such consent shall be expressed in the surrender and admission, and without his consent the surrender is wholly inoperative; and by the custom of the said manor, the husband takes no interest, after his wife's decease, as tenant by the curtesy. 2. A sur-

render may be made by the attorney duly appointed, but when a surrender is so made, it is always mentioned in the surrender that it was so made *by the attorney duly appointed*.

It does not appear that *T. Wood* had ever taken possession of the premises surrendered to him, or in what manner or when the defendant had obtained such possession. His mother died in 1821.

Various arguments were urged on the part of the plaintiff, to shew that the surrender might be valid, though the husband's consent was not expressed in it. The terms in which the custom is set forth were analysed to prove, that as the nullity arose from the want of consent, not from the want of its being expressed, parol proof of the consent might be received, and that such proof appeared on the case to have been given. But supposing this refined construction to prevail, the fact of consent is *not* stated in the case. Circumstances are indeed detailed from which a jury *might* be called upon to infer that, and liberty is given to the Court to make any inference that a jury ought to have drawn. We must however decline this office; we cannot undertake to say, whether a jury ought or ought not to have drawn that inference from the facts of the case; we rather think the contrary, more particularly when the party admitted tenant by the steward does not appear to have at any time taken possession under his admission. But we are far from acquiescing in the proposition asserted at the bar, that a custom requiring the expression of consent on the face of the surrender, would be void in law. There seems to be good reason for requiring the *best* evidence of that which is made essential to the validity of the act done, and that such evidence should *accompany* the act itself.

We were also told that the law itself would presume that the custom had been complied with, to prevent the surrender from being invalidated. Such presumption possibly might be made by way of *estoppel*, against one *claiming under* the surrender, but surely not against him who *denies* its efficacy.

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Besides, when the nature of this custom is considered, proof that no consent was *formally* expressed, must be taken as strong evidence that none was *given*. It really appears to us that the law might as well presume a seal, where the form of a bond was produced, and no seal appeared.

The plaintiff's main reliance was, however, placed on the necessity of restricting the custom to those cases where the husband has a *personal* interest in the wife's estate,—which is said not to exist in him under the circumstances. For as by the custom of the manor he does not become tenant by the curtesy, and as in this case he is said to have been divested, at the time of the surrender, of all interest during his wife's life, it is argued that there was nothing in him on which his consent could have operated, and that the custom could not therefore apply to a person in his situation.

Whether a Court could be *justified* in engrafting on a positive custom an implied exception, having reference to the *principle* on which it may believe the custom to have originated, seems to be a very questionable point; but it is one which we are not here required to determine. The custom exacting the husband's consent to an alienation of property by the wife, is found to be *general*, and must have universal operation; unless we clearly saw that carried beyond the line of restriction drawn in the argument for the plaintiff, it would become unreasonable and absurd. But we find no such ground for cutting down this custom, which may have been founded on the desire to protect not only the husband's interest, but that of the wife herself, and of her family, by constituting her husband, and the father of their common offspring, the guardian of both.

But even if the custom could be so limited, the fact of the husband having been stripped of all interest in her property, during her life, is neither stated in the case nor to be collected from the facts appearing. Of all the circumstances put forward for this purpose, not one amounts to *satisfactory proof*. The surrender in 1782, said to be made by B. S. by persons calling themselves his "assignees duly

appointed," makes no mention of a bankruptcy. It cannot bind him as the act of his attorney, not only on account of the custom for stating in the surrender the due appointment of such attorney, but for want of all proof of authority from him. The fact of the surrender might however be established against the defendant quoad the bankrupt's interest, if the bankruptcy and assignment should be proved against him by other evidence. Recourse is now had to the two deeds of 1796; the former of which, reciting a sale to have taken place under a commission of bankrupt duly awarded and issued against B. S., conveys to the defendant, lands sold thereunder by the assignees; by the latter, the defendant, acting upon that conveyance, executes a settlement of them upon himself, after his mother's death. The former deed, however, which recites the bankruptcy &c., is not executed by the defendant, and that which is so executed is silent respecting the bankruptcy: There is consequently no direct estoppel. He is said to have recognized and adopted the whole of the former deed by thus executing the latter. But is it true, as a general proposition, that a party so executing adopts the statement of facts in an anterior deed, which goes to make up his title? We are aware of no authority for such a doctrine. It is also remarkable, that the defendant is not stated to have had any enjoyment of the property, the subject-matter of those deeds; though possibly that would have made no difference. But it is material to add, that if the bankruptcy &c. had been regularly and strictly proved, so as to give validity to the surrender, in 1782, of all the bankrupt's interest in his wife's estate, he might possibly have become a new man in 1803, when his wife surrendered the estate in fee, which was then vested in her in possession by her father's death. If the bankrupt had been the party to the suit, the burthen of proving such a fact might have been cast upon him, but we apprehend that the law makes no presumption on the subject against this defendant, who, though the bankrupt's son, does not claim *under* him.

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Upon the whole, we think that the plaintiff has not succeeded in making out his title upon the facts brought before us, and that our judgment must be for the defendant.

Postea to the defendant.

The KING v. Rev. JOHN NEALE, Clerk.

Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, removes him upon insufficient evidence of the intoxication, the Court will issue a mandamus requiring the vicar to restore the clerk.

*Quere*, whether it would be sufficient ground to remove a clerk, that amongst his neighbours he was notorious as a drunkard, without proof of particular acts of intoxication and indecorum.

If one act of intoxication be relied on, the intoxication and consequent incapacity of the clerk to perform the duties

**R. V. RICHARDS**, in last Hilary term, obtained a rule, calling upon the Rev. *John Neale*, clerk, vicar of Staverton-cum-Boddington, in the county of Gloucester, to shew cause why a mandamus should not issue, commanding him to restore *George Bowles* to the office of parish clerk and sexton of the said parish, and why he should not pay the costs of this application.

*Bowles* had been charged by Mr. *Neale* with divers acts of intoxication, and was summoned to attend before him to answer the charge. He did not, however, attend, and evidence was given by a gentleman, who stated, that on the occasion of a marriage, *Bowles*, being in attendance in the church, appeared to be fresh in liquor, and unfit to perform the service with decorum. Upon this evidence the vicar removed *Bowles* from his office. Contradictory affidavits respecting the general conduct of *Bowles* were sworn.

Sir *W. Follett* and *W. H. Watson* now shewed cause. The vicar possessed the power of amotion, after summons of the party and reasonable cause shewn. Here, there was a summons, in pursuance of which the party might have attended, but as he neglected to do so, the evidence was all one way. Intoxication is clearly sufficient cause for amotion. The vicar was himself the judge of the sufficiency of the evidence to support the charge of intoxication.

of his office, when required to do so, should, at all events, be distinctly proved.



*Maule*, contra. There can be no doubt that the summons was a necessary step; Observation of *Fortescue*, J., in *Rex v. Chancellor, &c. of University of Cambridge* (a). This Court has a right to review the vicar's decision upon the evidence, and it must be shewn that the cause of amotion was substantial, and did not consist of mere slight acts of indecorum or neglect. In *Rex v. Warren* (b) it was held, that if a parish clerk, though appointed by a minister, be removed by him without a sufficient cause, a mandamus will lie to restore him. Lord *Mansfield*, C. J. said in that case, "Though a minister may have power of removing him upon a good and sufficient cause, he can never be the sole judge, and remove him *ad libitum*, without being subject to the control of this Court." And *Aston*, J., said, "As long as the clerk behaves himself well, he has good right and title to continue in his office. Therefore, if the clergyman has any just cause of removing him, he should state it to the Court." Afterwards, the Court, upon reading affidavits which stated that the clerk had become bankrupt and had not obtained his certificate; that he had been guilty of many omissions in the register, was actually in prison at the time of his removal, and had appointed a deputy who was totally unfit for his office, the Court said, "There is no sufficient reason assigned in the affidavits that have been read, upon which the Court can exercise their judgment, nor is there any instance produced of any misbehaviour of consequence. Therefore the rule for a mandamus must be made absolute." In the Reports of the Admiralty Court, temp. Lord *Stowell*, many cases occur, in which questions arose as to whether sailors had or had not forfeited their wages to acts of *intoxication*, and in no one of those cases was the intoxication held sufficient to deprive the sailors of their wages.

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LORD DENMAN, C. J.—I do not think we need enter into further discussion on this subject. I am by no means prepared

(a) 1 Strange, 566.

(b) 1 Cowper, 370.

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to say, that if a person had from all his neighbours the character of a notorious drunkard, that would not be a sufficient reason to remove him, without proof of any particular facts; and I am by no means prepared to say that if he had, on any single occasion, been proved to have misconducted himself, through drinking, at the church, that would not have been sufficient cause for removing him; but the only ground on which this charge rests is, that he has been guilty of *divers* acts of intoxication. I think that the least we can expect is, proof of the charge as made. We, sitting here, are to see that these proceedings do not take place without full authority and proof, and that one act of intoxication, at least, has been distinctly and fully proved. I do not find that is so; it is only stated, that in the opinion of a gentleman who was present, the clerk was, on the occasion of a marriage, *fresh in liquor*, and unfit to perform the service with decorum; it is not said he was *unfitted by liquor* to perform the service with decorum; and it is not alleged that any thing like indecorum, or any mistake or impropriety, or any irreverence, which can properly be censured in the conduct of the clerk, was the *consequence* of that supposed freshness in liquor on that occasion. I think, therefore, that we must call on this gentleman to make a return.

LITTLEDALE, J. and PATTESON, J. concurred.

COLERIDGE, J.—The Court is called on in this case, either by discharging this rule to turn the man out of the office for good, without further inquiry, or by letting the mandamus go, merely to put the matter into train for further inquiry. It is on that ground that I concur with the rest of the Court in thinking that this mandamus ought to go. Three of my brothers have a different opinion from myself, as to the sufficiency of the alleged cause of amotion, and that is quite sufficient reason, in my opinion, for the mandamus going.

Rule absolute.

1834

The KING v. The BRECKNOCK and ABERGAVENNY  
CANAL COMPANY.

A Rule had been obtained for a mandamus to the Brecknock and Abergavenny Canal Company, calling upon them to shew cause why they should not complete a railway, which, by a local act of 39 Geo. 3, they had the power, under certain circumstances, to elect to make, and which they were required to make, after they had made that election. From the affidavits it appeared that the defendants had elected to make, and had commenced a certain railway, which, if made, must cross a railway belonging to the Monmouthshire Canal Company. The defendants, fearing that they had not the power to cross that railway, after some negotiation and correspondence had taken place, declared that they were unwilling to complete the railway unless they were indemnified by the parties who now applied for the mandamus, and called for the indemnity accordingly. This indemnity was refused, and nothing had been done since by either party.

Before a mandamus will be issued to an incorporated company, commanding them to perform a duty, either a refusal in direct terms, or circumstances from which a refusal can be *conclusively* implied, must be shewn.

*Campbell*, A. G., and *E. V. Williams*, (and *Powell* was with them,) contended that there had been no *refusal* to complete the railway, and that therefore the Court would not issue the mandamus.

*Maule*, contra, contended, that the affidavits disclosed circumstances from which a refusal might be implied.

Lord DENMAN, C. J.—It is an undoubted rule, that no corporation can be called upon by mandamus to perform a duty, unless there has been a direct refusal to perform that duty. None such appears in this case. I do not mean to say that there must be, *in terms*, a direct refusal: it may be shewn by circumstances. Any thing which, as in *Rex v.*

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*Ford(a)*, distinctly shews to the Court that there has been a refusal, is sufficient. In this case, if the defendants have done that which is equivalent to a refusal, the mandamus ought to go; but, upon looking at the correspondence which has passed between the parties, it appears to me that the applicants have stopped short of what was necessary. After long delay, the answer of the Company is, "We will make the railway if you will indemnify us." The indemnification is refused, and there the matter stops. The applicants should have gone further, and have said, We demand to know positively whether you will complete the canal, and shall construe a neglect to answer into a refusal. All that the correspondence amounts to is, that some indemnity was expected on one side and refused on the other. We cannot, therefore, issue this mandamus without violating the rule by which we frequently save a long inquiry.

LITLEDAL, J.—The applicants ought to have followed their refusal to indemnify by a distinct demand to have the railway completed.

PATTESON, J.—It does not appear that there was any direct rescinding of the election, on the part of the Company, to make the railway.

COLERIDGE, J.—I think it of great importance to enforce the spirit of the rule, that before an application is made for a mandamus, the party to whom it is to be directed should know what he is required to do, and should have refused to do it. I do not mean to say that the refusal must be in direct terms, but that such circumstances should be shewn to the Court as *conclusively* amount to a refusal. Here no further application is made after the refusal to indemnify. Consistently with the facts of this case, the Company may have supposed that the applicants

did not wish them to run the risk of an action, although they, the applicants, were unwilling to give the required indemnity.

Rule discharged with costs.

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The KING  
v.  
BRECKNOCK  
and  
ABERGAVENNY  
CANAL  
COMPANY,

DOYLE v. STEWART (a).

DOYLE v. ANDERSON.

THE above and nine other actions having been commenced by the plaintiff against the several underwriters of a policy of assurance on the ship "Triton," a consolidation rule had been obtained by the defendants upon the usual terms, that the proceedings in ten of the actions should be stayed, the defendants in those actions undertaking to be bound by the verdict in *Doyle v. Dallas*, which was the eleventh action. In *Doyle v. Dallas* the defendant obtained a verdict, and taxed his costs, which were unpaid, the plaintiff being insolvent. The plaintiff, however, proceeded in another of the actions, viz. *Doyle v. Douglas*, and obtained a verdict, and received the costs in that action. The plaintiff was proceeding in the other nine actions, when a rule nisi was obtained to stay the proceedings in *Doyle v. Stewart*, upon the submission of the *plaintiff* and *defendant* in that action, to be bound and concluded by the verdict in *Doyle v. Anderson*. It was understood between the parties, that should this rule be made absolute, a similar rule should be made in each of the other seven actions.

A plaintiff cannot be required to consent that actions commenced by him against several underwriters, upon the same policy, shall be consolidated, upon the terms that the verdict in one action shall be binding in the other actions, upon the plaintiff as well as upon the respective defendants.

*F. Kelly* shewed cause. The Court has no power to compel the plaintiff to enter into this rule; and even if it possessed the power, this is not a case in which it should be exercised. The plaintiff here refuses his consent, and the Court cannot compel him to give such consent. The ordinary consolidation rule is made upon the submission of the

(a) This case was decided in last Trinity term.

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 DOYLE
 v.
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 DOYLE
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defendants, because they seek a *favour* which is granted to them. The *plaintiff* seeks no favour, and the circumstances of this case shew that it would not be for his benefit to enter into this rule. The very terms of the rule imply the necessity of the plaintiff's *consenting* to be bound. The language of Lord *Tenterden* in *Long v. Douglas (a)*, and the judgment of the Court in *Doyle v. Douglas (b)*, establish the same principle. It is true that in certain cases, the Court interferes where the proceedings of the plaintiff are vexatious; but there is no ground for saying that in this case the proceeding is vexatious. The plaintiff may have better evidence to adduce when the second cause is tried than he had at the time of trying the first. As an illustration of this observation, the different results in the two actions which have already been tried may be appealed to.

This application is not founded on any precedent. Even supposing that this rule were made absolute, the object of the defendant would not be obtained, since, by the terms of the rule, the proceedings are to be stayed *upon the submission of the plaintiff*, which he may refuse.

Maule, *contrà*. The rule may perhaps be open to the criticism which has been applied to it, but if its terms be inaccurate, they may be modified so as to meet more precisely the object of the party in moving, and the intention of the Court in granting the rule. The request is, that the proceedings in *Doyle v. Stewart* may be stayed, and that both parties may be concluded by the verdict in *Doyle v. Anderson*. The understanding of the profession has certainly been that *both* parties were bound by the consolidation rule, and it was only in *Doyle v. Douglas* that it was determined not to be binding upon the plaintiff. There is no want of power in the Court, for it has frequently interfered in this way, where it has seen that the proceedings were vexatious. The machinery by which the Court can compel the plaintiff to consent, is by staying the proceedings in all the actions

(a) 4 Barn. & Adol. 545 (a).

(b) 4 Barn. & Adol. 546.

except one. The plaintiff ought to be bound by the event of the trial of one action, since it is a mere technical mode^(a) of carrying on the business of underwriting, which occasions separate actions. There are but *two* parties to the actions, the assured and the assurers; and the object of the rule is to decide by a single trial that which is in reality only a single question. It is said that the rule is not for the benefit of both parties. Surely it is as much for the benefit of the plaintiff as of the defendants, that the single question should be decided by one or two trials. The consolidation rule is entirely the creature of the Court, and the Court has therefore power to alter its terms. Here, the defendant asks only for what is *just*, and this the Court has the power of giving, although the party may withhold his consent. By the usual consolidation rule the Court exercises the power of staying the proceedings, upon the consent of the defendants only, to be bound by the result of the verdict in the cause which is tried; and though in that case, the proceedings in the other actions are only stayed until after the trial of the one cause, yet there appears to be no reason to deny the power of the Court to stay them for an indefinite period.

Lord DENMAN, C.J.—We cannot, in my opinion, comply with this request. We should have been glad to find that we had such a power; but the principle of the consolidation rule has always been, that as the defendants ask for a *favour*, they may reasonably be required to pay the price of it. It may be that in this case the consolidation rule would benefit the plaintiff, but we cannot compel a party to accept a benefit for which he does not ask.

LITLEDALE, J. concurred.

(a) Arising out of the prohibition of joint insurances by private underwriters, introduced by the legislature (6 *Geo.* 1, c. 18.)

for the purpose of giving a monopoly of joint insurances to the Royal Exchange Office and the Sun Fire Office.

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DOYLE
v.
STEWART.
DOYLE
v.
ANDERSON.

1835.

DOYLE

v.

STEWART.

DOYLE

v.

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TAUNTON, J.—It is a mistake to suppose that the consolidation rule was ever considered to be binding on both parties.

WILLIAMS, J. concurred.

Rule discharged.

WARD v. TUMMON (a).

Where (since the Uniformity of Process Act) the defendant is arrested upon *capias* in *assumpsit*, and the plaintiff afterwards declares in covenant, the Court will set aside the declaration; but will not direct that the *bail* be discharged.

THE defendant was arrested on a *capias* in *assumpsit*. The plaintiff afterwards declared in covenant. A rule having been obtained, calling upon the plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece, and why the proceedings should not be set aside for irregularity,

Archbold showed cause. The plaintiff may be considered as having declared by the bye, upon a different cause of action from that upon which the defendant was arrested. The time for declaring in pursuance of the writ is not yet elapsed. Perhaps it must be admitted that if the time had elapsed, the plaintiff would not be at liberty to give this answer to the objection. But, even supposing the *declaration* to be irregular, that can form no ground for discharging the bail.

J. L. Adolphus, *contra*. In *King v. Skeffington* (b), it was held, that if the notice of declaration be for a different cause of action from that stated in the writ of summons, it is irregular; and in *Thompson v. Dica* (c), it was held, that the declaration must correspond with the form of action specified in the writ; and that if the declaration is in a different form, it is irregular. The plaintiff

(a) This case was decided in Trinity term last.

(b) 1 Crompt. & Mees. 363.

(c) Ibid. 768.

cannot be allowed, in answer to an objection of this sort, to suggest that the declaration may be treated as a declaration by the bye (a); for to hold that such an answer might be given, would be at once to put a veto on objections of variance between the writ and declaration. The Uniformity of Process Act requires that the *writ* shall disclose the true cause of action. The plaintiff has shewn by his mode of declaring here, that the writ did not disclose the true cause of action. Therefore the *bail* are entitled to be discharged. [Williams, J. I rather think that you are asking too much in requiring that the bail shall be discharged.]

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WARD
v.
TUMMON.

Cur. adv. vult.

Lord DENMAN, C. J. on a subsequent day, said, We think that you are entitled to have the declaration set aside, but not to have the bail discharged.

J. L. Adolphus asked whether the rule might be made in the alternative.

Lord DENMAN, C. J.—We think that the bail are not entitled to be discharged, and therefore the rule must be absolute only, for setting aside the declaration.

Rule absolute accordingly.

(a) As by the Uniformity of Process Act, (2 Will. 4, c. 39,) personal actions are to be commenced by the writs therein specified, in the cases to which such writs are applicable, it has been doubted whether declarations by the bye, even at the suit of the same plaintiff, are not abolished. 1 Chit. Archb. Prac. 180; Tidd's Suppl. (1833) 120.

1835.

BIRD, Clerk, v. RELPH and Wife.

Under an inclosure act, lands are fenced in and allotted to the vicar and his successors, in lieu of tithes. The vicar dies, leaving the fences out of repair: Held, that his executors were liable to be sued by the succeeding vicar, for dilapidations.

CASE by the plaintiff, as vicar of Ainstable in Cumberland, against the defendant, and his wife as executrix of the last vicar, *William Smith*, for dilapidations of the vicarage-house, and of the fences of the gardens and ancient glebe lands and of certain lands of which *Smith* was seised, jure vicariæ. The defendant suffered judgment by default as to the dilapidations of the vicarage-house and outhouses, and of the fences of the gardens and ancient glebe lands, and pleaded the general issue as to the residue.

At the trial before *Gurney, B.*, at the Cumberland Spring assizes, 1833, the jury assessed the damages on the judgment by default at 78*l.* 4*s.*, and found a verdict on the issue, for the plaintiff, damages 100*l.*, subject to the following case:—

Smith was vicar of Ainstable from 1797 until his death in February, 1832. The plaintiff became vicar in May, 1832, and has so continued ever since.

In 58 *Geo.* 3, an act passed for inclosing lands in Ainstable. This act contained a clause which, after reciting that *Smith*, as vicar, was entitled to the small and mixed tithes arising as well out of the ancient lands, &c. as from the commons and waste grounds, and that it was desirable that the persons interested in the ancient lands, &c. and in the commons, &c. should be exonerated from such tithes, directed that the commissioners should set out, allot, and appoint, to and for *Smith* and his successors, vicars of &c., so much and such part or parts of the said commons &c. as should in their judgment be deemed equivalent to, and a full recompense and satisfaction for the small and mixed tithes and ecclesiastical dues, (Easter offerings, mortuaries, and surplice fees only excepted,) due, payable, or of right belonging to the vicar, out of or from the said commons &c.; provided that the outermost fence or fences which should inclose the said allotment or allotments so to be made to, unto, and for the vicar, in lieu of his tithes of the said com-

mons &c., should *be first well and sufficiently made in such manner as the said commissioners should direct*, the charges and expenses whereof should be raised and paid in the same manner as the public charges and expenses of the division of the commons &c., were thereby directed to be raised and paid; but that all the said fences should, after the first making and erecting thereof, be maintained and kept in repair by and at the expense of *Smith and his successors, vicars, &c.* (a)

In 1820-1821, the commons &c., were inclosed, and four hundred and sixty-five acres were allotted to *Smith* and his successors, in lieu of his tithes. In 1821, *Smith*, as such vicar, entered into possession of the allotments, whereof the outermost fences had been made, according to the directions of the commissioners, with sods and quick thorns, and posts and rails, the posts and rails being calculated to last not more than three or four years. The fences were paid for as the act directs.

At the death of *Smith* the outermost fences of the allotments were broken down; and it would require 100*l.* to put the same into proper repair.

The case was argued in Easter term, 1834, before *Littledale, J.*, and *Parke, J.*

Armstrong for the plaintiff. The defendants are liable in respect of the dilapidations to the fences of the lands, held by their testator, *jure vicariæ*. Though the statute of *Elizabeth* does not expressly mention *fences and hedges*, but speaks only of decayed or ruinous *buildings*, yet, as it is stated in *Burn's Eccles. Law* (b), it is certain that hedges, fences, ditches, and the like, are comprehended under that name. Besides which, the inclosure act, by which these lands were allotted to the late vicar, expressly

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RELPH
and another.

(a) The above was stated to be part of the case to be referred to by either party.
(b) 2 *Burn's Eccl. Law*, 150, 152.

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casts upon the vicar the duty of repairing them when once duly made.

Dundas, contra. The general principle cannot be disputed. 1 *Wms. Saund.* 216, *a.*, *Williams on Executors*, 1068, *Digge's Parson's Counsellor*, 138, put out of doubt the question of the general liability of the executors of a deceased rector, &c. for dilapidations to the buildings, fences, &c. upon the lands of the rectory, &c.; but it is submitted that no action lies against the executors for dilapidation of these fences; *Sollers v. Lawrence (a)*.

First, because this allotment made to the testator during his lifetime, stands on a different footing from ancient glebe lands, and is not, like them, subject to the common law and custom of England as to dilapidations; *Radcliffe v. D'Oyly (b)*, *Young v. Munby (c)*, *Wise v. Metcalfe (d)*, and the quotation there (e) from *Lyndwood's Provinciale*.

Secondly, the commissioners did not perform their precedent duty of well and sufficiently making the fences; for it appears that the fences made under their direction, were calculated to last three or four years only. [*Parke, J.* The commissioners were to be the judges of the sufficiency. If they exercised an improper judgment ought you not to have appealed?] The liability of the incumbent to repair did not arise until the commissioners had performed their duty. *Ellis v. Arnison (f)*, *Rex v. Cumberworth (g)*. [*Parke, J.* The difficulty is this,—the commissioners appear to have a discretion as to the sufficiency of the fences to be erected, and such a fence has been erected as the commissioners deemed necessary.]

Armstrong was heard in reply.

Cur. adv. vult.

In last Hilary term, LITLEDAL, J., delivered the judgment of the Court, as follows:—This case was argued before

(a) *Willes*, 413.

(b) 2 T. R. 630.

(c) 4 *Maule & Selw.* 183.

(d) 5 *Mann. & Ryl.* 249; 10

Barnw. & Cressw. 299.

(e) 10 *Barnw. & Cressw.* 306.

(f) 5 *Barn. & Alders.* 47.

(g) 3 *Barn. & Adol.* 108.

my brother *Parke* and myself, and my brother *Parke* fully concurs in the judgment which I am about to deliver. There is no doubt that if the *ancient fences* of the glebe land are dilapidated at the time of the death of a vicar, his executors are liable to the successor. *Lyndwood*, 254; *Gibson's Codex*, 789(a). As to the liability in respect of the dilapidations of the fences of the ancient glebe land, no question arises, the defendants having let judgment go by default as to them; but the question here is, whether the executors are liable in respect of the lands allotted to the testator as vicar, under the inclosure act. This action is not brought upon that act, but upon the common law and custom of England; and therefore the question to be considered is, whether an allotment made to the late vicar, in lieu of tithes, can be subject to the common law and custom of England. By the *common law and custom* is meant, not immemorial usage, but the common law of the land,—as was said in the case of *Wise v. Metcalfe*(b). In *Gibson's Codex*, 753, it is said that there were no vicarages at common law; and, as appears from that work, much the greater part of the rights of vicars have commenced since the time of legal memory(c). We are of opinion that this allotment follows the same rule as the ancient glebe land, &c.—the more especially as it was given to the vicar in lieu of the tithes previously annexed to the vicarage. It does not follow that the vicar would have been bound to put up fences or to keep them in repair afterwards, if new land had been given to the vicarage or an allotment made, as in this case, and such land had originally come to him *uninclosed*.

We cannot now inquire whether the commissioners exercised a proper judgment originally, as to the sufficiency of the fences erected under their direction.

Judgment for the plaintiff.

(a) Title *Remedies in case of Dilapidations*.

(b) *Supra*, 880.

(c) i. e. since the coronation of Richard I. in July 1189.

1835.

BIRD

v.

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and another.

1835.

NICHOLAS v. HAYTER. (a)

A defendant applying for costs under 43 G. 3, c. 46, must shew a *prima facie* case of absence of reasonable or probable cause for arresting for the amount sworn to.

A great disproportion between the sum recovered and the amount sworn to, is a sufficient *prima facie* case.

And it is no answer for the plaintiff to allege, that but for the death of one material witness and the absence, abroad, of another, he could have proved a debt to the full amount.

A party, who has a just demand against another, has not reasonable or probable cause to arrest him, unless he has legal evidence to support his demand.

FOLLETT had obtained a rule calling upon the plaintiff to shew cause why the defendant should not be allowed his costs in this cause, pursuant to 43 Geo. 3, c. 46. The affidavits upon which the rule was obtained, stated to the following effect:—This was an action for business done by the plaintiff as an attorney. The plaintiff by his bill claimed 56*l.* 15*s.* 2*d.*; and he caused the defendant to be arrested for 50*l.* and upwards. The charges in the bill were principally for the expenses of a journey to London, and remuneration for time employed in such journey, which was alleged to have been undertaken at the request of the defendant and on his business. At the trial at the last Cornwall summer assizes, the plaintiff endeavoured to prove that the journey was undertaken upon a retainer by the defendant, but the jury found that he did not go to town on the business of the defendant, and gave a verdict for 12*l.* only, for business done. This sum the plaintiff recovered, and no more. The affidavit concluded by denying that the plaintiff had reasonable or probable cause for such arrest. The plaintiff in his affidavit in answer stated, that he caused the defendant to be arrested as he was on the point of embarking for America; that he had been retained by the defendant to perform the journey in question, and that but for the death of his son, who at the time of the transaction had been one of his clerks, and the absence in America of a person who had been his other clerk, he should have been prepared with sufficient evidence of the retainer, and should have proved to the full amount for which the defendant was arrested. He further stated, that the defendant on one occasion offered to give him 30*l.* in satisfaction of his demand; that he agreed to accept that sum, but that the defendant's attorney refused to carry the arrangement into effect.

(a) This case was determined in last Michaelmas term.

Crowder shewed cause. He contended, that the defendant had not by his affidavit shewn such want of reasonable and probable cause for arresting for 50*l.*, as the statute contemplates; that the object of the statute was to prevent *frivolous* and *vexatious* arrests, and that an arrest could not be said to be frivolous and vexatious, merely because the party has no strict legal evidence of a debt to the amount for which he arrests. [*Patteson J.* A party must not arrest another, if he knows that he has no evidence of the debt. It has been held, that the defendant is entitled to costs in such case (*a*). A party must know that he has probable proof, before he makes an affidavit of debt to ground an arrest.]

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v.
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Follett, S. G. *contra*, was stopped by the Court.

LORD DENMAN, C. J.—It certainly lies upon the defendant to shew the want of reasonable cause for arresting for the amount; but if he shews it *prima facie*,—as he does where the sum recovered falls very far short of the sum for which the arrest was made,—a better answer than is given in this case will be required of the plaintiff.

TAUNTON, J.—The defendant must shew, in the first instance, a want of reasonable and probable cause. I think it is sufficiently done by him, and that it is not answered. The defendant's affidavit appears to me to state the facts very fairly.

PATTESON, J., and WILLIAMS, J., concurred (*b*).

(*a*) In *Griffiths v. Pointon*, *ante*, ii. 675. *Ashton v. Naul*, 3 *Moore & Scott*, 184; *Amor v. Blofield*, 9

(*b*) And see *Donlan v. Brett*, 5 *Mann. & Ryl.* 29; 10 *Barn. & Cressw.* 117; *Day v. Pictou*, 5 *Mann. & Ryl.* 31; 10 *B. & C.* 120; *Russell v. Atkinson*, *ante*, ii. 667; *Bingh.* 91; *Sims v. Jaquest*, 10 *Bingh.* 510; *Reynolds v. Flower*, 3 *Moore & Scott*, 801; *Simmans v. Grosvenor*, 2 *Dowl. P. C.* 224; *Beare v. Pinkus*, *ante*, 846.

1835.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of King's Bench.)

DAY v. ROBINSON.

Semble, that these words "You have robbed me of one shilling *tan-money*," are not actionable, as the Court cannot take notice that *tan money* maybe the subject of robbery.

The import of the term "*tan-money*" cannot be supplied by an *innuendo*, unsupported by a corresponding inducement.

No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action.

And when a judgment had in fact been given for the plaintiff to recover damages so assessed, a *venire de novo* (a) was awarded (b).

CASE for slander, by *Robinson* against *Day*. The first count of the declaration, after stating that *Robinson* had been employed by *Day* as his servant, and as such had conducted himself with honesty, fidelity, &c., and had gained the good opinion of his neighbours, proceeded as follows:—And whereas also the plaintiff, before and at the time of &c., had quitted and left the service of the defendant, and was recommended to, and was likely to be retained and employed by and in the service of *E. Rawlins*, as a servant, for certain wages to be therefore paid to him. Yet the defendant, well knowing the premises, but contriving &c. to injure the plaintiff in his good name &c., and to bring him into public scandal &c. amongst all his neighbours &c., and particularly with *Rawlins*, and to cause it to be suspected and believed, that while the plaintiff was in the service of the defendant, as aforesaid, the plaintiff had therein conducted himself dishonestly and unfaithfully, and had robbed the defendant, and was a dishonest and disreputable person, and therefore unfit to be employed as a servant, and to prevent *Rawlins* from retaining and employing the plaintiff in his service, as he otherwise might and would have done, and to vex, harass, &c. the plaintiff, heretofore, to wit, on &c., in a certain discourse which the defendant had with the plaintiff of and concerning the plaintiff, in the presence and hearing of divers &c., falsely and maliciously spoke these false &c. words following; that is to say, "You" (meaning the plaintiff) "have robbed me" (meaning himself, the defendant,) "of a

(a) As to the necessity of awarding a *venire de novo*, *vide post*, 888 (a).

(b) In this case the *venire de novo* was awarded by a Court of Error; but the mode of correcting the defective finding would, strictly speaking, be the same, whether the defendant brought a writ of error or moved in arrest of judgment. In the latter case, however, the verdict might, in most cases, be set right by amending the *postea* according to the judge's notes, when from those notes it appeared that it could be inferred that the evidence would support an assessment of damages upon the good counts alone.

shilling." The second count stated the defamatory words as follows: "You" (meaning the plaintiff) "have robbed me" (meaning himself, the defendant,) "of one shilling, *tan money*," (thereby meaning that the plaintiff had fraudulently and wrongfully taken and applied to his own use the sum of one shilling, being part of a certain sum of money, that is to say, the sum of 6s. 6d., which the plaintiff had received into his custody, as the servant of and for and on behalf of the defendant; and which money was so paid to the plaintiff for and on account of the defendant, as and for the produce of the sale of a certain quantity of a certain article called "tan," theretofore sold by the plaintiff for and on the behalf and as the servant of him the defendant, and for which sum of 6s. 6d., the plaintiff, as such servant as aforesaid, was accountable to the defendant.) The third count alleged, that the defendant, in a certain discourse had with *Rayment Berrill*, of and concerning the plaintiff, in the presence of the said *Rayment Berrill* and divers other persons, spoke the defamatory words following: "*Robinson*" (meaning the plaintiff) "has been robbing me" (meaning the defendant) "of tan money;" (thereby meaning that the plaintiff had robbed the defendant of certain moneys of the defendant, which the plaintiff had received into his custody, as the servant of and for and on behalf of the defendant, &c.,—substantially as in the corresponding part of the last innuendo in the second count,) "and has also robbed *George Asplin's* desk of money, two or three times," (thereby meaning that the plaintiff had, on two or three several occasions, feloniously stolen and taken away divers sums of money from and out of a certain desk used by one *George Asplin*, then being also a servant of the defendant,) "and I" (meaning himself, the defendant,) "have sent him" (meaning the plaintiff) "off;" (thereby meaning that the defendant had dismissed and discharged the plaintiff from the employ and service of the defendant, on account of the dishonest and unfaithful conduct of the plaintiff.) The fourth count stated the defamatory words (which were

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alleged to have been spoken as in the last count,) as follows: "*Robinson*" (meaning the plaintiff) "has been robbing me" (meaning himself, the defendant,) "*of tan money,*" (thereby meaning that the plaintiff had *cheated and defrauded* the defendant of certain moneys which the plaintiff had received into his custody as the servant of and for and on behalf of the defendant &c.,—substantially as before.) The fifth count stated the defamatory words as follows: "*Robinson*" (meaning the plaintiff) "broke open and robbed *George Asplin's* desk," (thereby meaning that the plaintiff had feloniously stolen and taken away divers sums of money and other articles, from and out of a certain desk used by and in the possession of one *George Asplin*.) The sixth count stated defamatory words to have been spoken by the defendant in conversation with one *Lacy*, as follows: "Ah! Mr. *Robinson*, indeed! He" (meaning the plaintiff) "has been robbing me," (meaning himself, the defendant,) "and I have sent him off," (thereby meaning that the plaintiff, while he was in the service of the defendant, had robbed, cheated, and defrauded the defendant, and that by reason of the dishonest and unfaithful conduct of the plaintiff, as such servant as aforesaid, the defendant had dismissed and discharged the plaintiff from the defendant's service and employ.) The seventh count was similar to the third, except in stating the words to have been spoken in a discourse with one *Jones*. The eighth count (also in a colloquium with *Jones*,) stated the words thus: "*Robinson*" (meaning the plaintiff) "has robbed me," (meaning the defendant; thereby meaning that the plaintiff had cheated and defrauded the defendant of certain moneys, which the plaintiff had received into his custody as the servant of, and for and on behalf of the defendant.) The declaration stated as special damage, that *Rawlins*, who before and at the time of &c., was about to retain and employ, and would otherwise have retained and employed the plaintiff as his servant for certain wages, wholly refused to retain or employ him.

Pleas: first, not guilty; secondly, as to the words con-

tained in the 1st, 2d, 4th, 6th, and 8th counts, and part of the words in the 3d and 7th counts, a justification.

Replication to the second plea, *de injuriâ*.

The jury found both issues for the plaintiff, damages 150*l*.

Judgment was afterwards entered up(a) in the Court of King's Bench, for the plaintiff generally,—150*l*. damages, and 158*l*. costs.

Error having been brought, the case was argued in last Trinity term before *Tindal*, C. J., Lord *Lyndhurst*, C. B., *Park*, J., *Gaselee*, J., *Bosanquet*, J., *Bolland*, B., *Alderson*, B., and *Gurney*, B.

*F. Kelly*, for the plaintiff in error, was stopped by the Court, who called upon the counsel for the defendant in error to support the judgment.

*Platt*, for the defendant in error. It cannot be doubted that the first count is good. [*Tindal*, C. J. It is clearly good according to *Slowman v. Dutton*(b), and *Tomlinson v. Brittlebank*(c). But in some of the other counts, the innuendoes *change the sense* of the previous words, by the introduction of new and distinct facts, not alleged in the inducement. All the decided cases are against the introduction of new facts in the innuendo(d).] The innuendo may be rejected as surplusage. [*Tindal*, C. J. That may be done where the words spoken import, in themselves, a criminal charge, and the innuendo introduces matter that is merely useless, and not in any way altering the nature of the charge which the words would import. But how are we to know that *tan money* can be the subject-matter of robbery? and even if we were to take notice of the meaning of *tan money*, the facts introduced in the innuendo shew that the defendant did not mean to impute robbery,

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First point:  
Innuendo.

(a) Without any motion in arrest of judgment.

(b) 10 Bingham 402; 4 Moore & Scott, 174.

(c) *Ante*, vol. i. 455; 4 Barnw. & Adol. 630.

(d) *Vide* Com. Dig. *tit.* Action upon the Case for Defamation, (G. 8, G. 10.); Bac. Abr. *tit.* Slander, s. 4.; *De Grey*, C. J., in *Res v. Horne*, 1 Cowp. 684; 1 Vin. Abr. 524, *tit.* Actions (for Words) (I b.)

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but embezzlement.] The expression, "*one shilling ten money,*" must mean something which may be the subject-matter of robbery. Suppose that the words had been, "You have robbed me of one shilling *pocket money?*" [Alderson, J. I do not know that these words would have been slanderous in themselves, but your innuendo introduces another meaning of the word "*rob.*" Park, J. And you shew the words on the record not to charge a robbery.] If the innuendo is supported, it shews that the plaintiff had a good cause of action; but if, on the other hand, it is to be rejected, it cannot be looked to for the purpose of qualifying the meaning of the word "robbed." Rejecting it, there is a simple charge of robbery, which is actionable.

Second  
 point (b):  
 Words action-  
 able with spe-  
 cial damage.

It is not, however, necessary to shew that the words in all the counts are actionable *in themselves*; for as special damage is laid, it is sufficient to shew that words actionable *with special damage* are stated. Whether the innuendoes be rejected or received, it is submitted that in every count there are clearly words which are actionable *with special damage*.

TINDAL, C. J. (after conferring with the other Judges.) —The special damage is stated as the result of the speaking of *all* the words in the several counts, not of the words stated in those counts only which are good. It is impossible, therefore, upon this *general* finding of the jury, that we can see that the damages have been given in respect of those counts only which are good, and of the special damages resulting from the words stated in *those* counts. Part of the damage may be for the one count, and part for the other. In order, therefore, that the damages may be ascertained to be given for that part of the declaration which is free from the objection before adverted to, we think that a venire de novo must be awarded.

Venire de novo awarded (a).

(a) As no writ of attainr can now be brought, (6 G. 4, c. 50, s. 60,) it would seem that the Court might have upheld the finding of the jury *upon the issues*, and have awarded a writ of inquiry to *assess the damages*

only. *Vide Cheyney's case*, 10 Co. Rep. 118 b; *Herbert v. Waters*, Carthew, 362; *Kynaston v. Mayor of Shrewsbury*, 2 Str. 1052; 1 Wms. Saund. 195 b.

(b) Not noticed in the judgment.

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BURN and another v. CARVALHO and others, Assignees of  
FORTUNATO, a Bankrupt, (in Error.)

THE facts of this case appear in the report, *ante*, vol. i. p. 700, of the decision of the Court of King's Bench upon the special case. The special case having been, pursuant to a power reserved, turned into a special verdict, such verdict was stated upon the record returned to the writ of error sued out upon the judgment of the Court below. The errors were argued in last Easter vacation, before Tindal, C. J., Lord Lyndhurst, C. B., Park, J., Gaselee, J., Bosanquet, J., Bolland, B. and Gurney, B.

The assignees of a bankrupt do not take under the assignment, property, the equitable title to which had been transferred before the bankruptcy.

But such equitable transfer must have been complete before the bankruptcy: it must have been a transfer of the whole or an ascertained part of specific property, and absolute, not contingent.

Starkie, for the plaintiffs in error, contended that the assignees of a bankrupt could not recover, upon a mere legal title, property which they would be bound in equity to refund when recovered; that in this case the letters operated as such an *equitable assignment* to the plaintiffs (in error) of the goods directed by the bankrupt to be handed over to their agent at Bahia, as would give them an interest not liable to be defeated by an act of bankruptcy occurring

*A.* at Liverpool, having consigned goods to *B.*, at Bahia, for sale on his (*A.*'s) account, draws bills on *B.* to be paid out of the produce of the consignment. *A.* negotiates the bills with *C.* in London. Upon *B.*'s refusing to pay the first of the bills, *C.* writes to *A.* as follows: "I request you to write to *B.* by the first vessel, with orders that, in case he does not pay your drafts, he shall immediately hand over such property as he may have of yours of an *equivalent value* to the bills not paid by him, to *D.* my agent at Bahia." *A.* answered, "Agreeably to your instructions, I will write to *B.* by brig *W.*, directing him to hand over to *D.* property of mine in his hands to cover the amount of the bills that may eventually not be paid." *A.* accordingly wrote to *B.* this letter, which was not communicated to *C.*, "I have engaged to *C.* that you shall pass into the hands of *D.*, his agents, all the property which may exist in your hands for my account; you will arrange with *D.* the mode," &c. Before this letter reached Bahia *A.* became bankrupt; *D.* afterwards receiving goods from *B.* to an amount somewhat less than the bills unpaid, sold them, and remitted the produce to *C.*:—Held, that *C.* had not, at the time of the bankruptcy, such an equitable interest in the goods as would prevent *A.*'s assignees from recovering in trover.

*Dubitatur*, whether the last of the above letters was admissible in evidence; but held, that, whether admitted or not, the assignees might recover.

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before the actual delivery of the goods. He further contended, that the letter of 11th April from the bankrupt to *Rego*, (which was rejected by the Court below) was so connected with the letters of the 4th and 9th, that, although not communicated to the plaintiffs in error, it was not liable to be countermanded by the bankrupt,—or by the operation of his bankruptcy; or that it might, at all events, be used in aid of the other letters. *Lempriere v. Pasley* (a), *Brown v. Heathcote* (b), *Bailey v. Culverwell* (c), *Scott v. Porcher* (d), *Falkener v. Case* (e), and *In re Ship Warre* (f), were cited in the course of this argument.

*Crompton* contra, contended that the rule that assignees of a bankrupt cannot take under the assignment, property, the equitable title to which was in another than the bankrupt, is limited to cases in which the bankrupt was a mere *naked trustee*; and that therefore if the bankrupt possessed a *possibility* of interest, from which a benefit might result to his creditors, as by reason of a surplus after satisfying the equitable claim of such other party, the assignees were entitled to recover: that the letter of 11th April, not having been communicated to the plaintiffs in error, did not form part of the contract between them and the bankrupt, and was a mere countermandable authority, which *was* countermanded by the bankruptcy: that without such letter, and even if it were received, there was not shewn to have been any equitable assignment by the bankrupt of any *certain* or *specified amount* of property, but at most only an agreement to assign, *in the event* of the bills being unpaid, goods equivalent to the amount of the bills which might *happen* to be unpaid by the bankrupt or his agent. *Best v. Argles* (g), *Scott v. Porcher* (h), *Ex parte Heywood* (i), *Row v. Daw-*

(a) 2 T. R. 485.

(b) 1 Atk. 160.

(c) 2 Mann. &amp; Ryl. 564; 8 Barnw. &amp; Cressw. 448.

(d) 3 Meriv. 652.

(e) 1 Brown's Ch. Ca. 125; 355.

2 T. R. 491, MS. cited.

(f) 8 Price, 269, n.

(g) 2 Crompt. &amp; Mees. 401.

(h) 3 Meriv. 652.

(i) 2 Rose's Bankruptcy Cases,

*son (a), Yeates v. Groves (b), Bailey v. Culverwell (c), Carpenter v. Marnell (d), and Winch v. Keeley (e),* were cited and relied on, or distinguished from the present case, in the course of this argument.

*Cur. adv. vult.*

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In the following vacation the judgment of the Court was delivered by Lord LYNDHURST, C. B. (in the absence of Tindal, C. J.) as follows:—The question in this case is, whether there was an equitable transfer by *Fortunato*, before his bankruptcy, of the goods which are the subject of this action? Unless there was such a transfer complete before the bankruptcy, the property in the goods passed to the assignees. We think there was not such a complete transfer, and consequently that the plaintiffs below are entitled to recover. By the terms of the Bankrupt Act (*f*), all the personal estate which the bankrupt possessed at the time of the bankruptcy, vested in the plaintiffs below by the assignment; and therefore, unless an equitable lien existed at the time of the assignment, upon the whole or an ascertained part of the property in question, such property had passed to them by the assignment. It is admitted by the plaintiffs below, that nothing passed to them by the assignment, but such property as the bankrupt was equitably as well as legally entitled to. Then do the facts here shew, consistently with decided cases, that the equitable title to these goods had passed from the bankrupt to the defendants before the bankruptcy? In *Brown v. Heathcote (g)*, *Falkener v. Case (h)*, and *Lemprierey v. Pasley (i)*, the assignment was direct and unequivocal, and complete before the act of bankruptcy. There was in those cases nothing dependent on a contingency, much less on a contingency which might

- (a) 1 Ves. sen. 331.
- (b) 1 Ves. jun. 280.
- (c) 9 Man. & Ryl. 564; 8 Barn. & Cressw. 448.
- (d) 3 Bos. & Pul. 40.

- (e) 1 T. R. 623.
- (f) 6 Geo. 4, c. 16, s. 63.
- (g) 1 Atk. 160.
- (h) 2 T. R. 491, MS. cited.
- (i) 2 T. R. 485.

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not have been determined before the assignor became bankrupt. Nor could it be objected in those cases, that the assignment was not of the whole or of an ascertained part of the goods in question. And where the payee of a note delivers it for value, but neglects to indorse it, and afterwards becomes bankrupt, and the assignees after the bankruptcy receive the amount of such note, it has been decided that they hold such amount as trustees for the party to whom the note was delivered; *Ex parte Byas (a)*. *Smith v. Pickering (b)* is a similar case. But in those cases the delivery was complete, and the extent of the lien ascertained before the bankruptcy. Here, the defendants below, at the time when they wrote their letter of April 4th to the bankrupt, were ignorant both of the amount of the bills to be returned for non-payment, and the amount of goods in the hands of *Rego*. All that they ask of the bankrupt in that letter is, "that you will write to Mr. *Rego* by the first vessel, with orders that in case he does not pay your drafts, he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent Mr. *Vogeler* of Bahia;" and the bankrupt, in his answer dated April 9th, says, "I will write to Mr. *Rego* per brig *Wavertree*, to sail on the 12th of this month, directing him to hand over to Mr. *Vogeler* property of mine in his hands, to cover the amount of bills that *eventually* may not be paid." Here is no immediate assignment of any certain and specified amount of property but at most only an agreement to assign, on a *contingency*, an *uncertain* quantity of goods; and that quantity remained uncertain up to the time of committing the act of bankruptcy,—upon which, all the property, legal and equitable, which the bankrupt had, became vested in the assignees; and having once passed to them, it could not be divested again to answer the event of a conditional assignment. There is no authority for saying that this could take place;

(a) 1 Atk. 124.

(b) Peake's N. P. C. 50.



and the principle of the bankrupt law is against it. As to the letter dated April 11th, which was rejected by the Court below, some of the judges of this Court think that as it was the letter referred to by the bankrupt in his letter dated April 9th, as about to be written by him, and as the writing of it formed part of the transaction, it was admissible in evidence. But the reception of it would not remove the difficulty which has been stated, and therefore it is unnecessary to determine this point. The Lord Chief Justice of the Common Pleas concurs with us in the present decision. The judgment will be affirmed.

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Judgment affirmed.

The Master, upon the taxation of the costs of the plaintiffs below, believing this case to be within sect. 30 (a) of 3 & 4 Will. 4, c. 42, which received the royal assent 14th August, 1833, allowed them *interest on the damages recovered* from 3d June 1833, on which day the writ of error was tested. *Starkie*, in Michaelmas term, moved this Court for a rule calling upon the Master to review his taxation, and to strike out the sum so allowed for interest. He contended that the enactment upon which the Master had proceeded was *prospective* only, and that as the act received the royal assent on a day subsequent to the suing out of the writ of error in this case, interest ought not to have been allowed.

*Crompton* contra contended, that as by section 44 of the act it was expressly enacted "that the act should commence

(a) Which enacts, "that if any person *shall* sue out any writ of error upon any judgment whatsoever, given in any Court, in any action personal, and the Court of Error shall give judgment for the

defendant therein, then interest shall be allowed by the Court of Error for such time as execution has been delayed by such writ of error, for the delaying thereof."

obtained until a day subsequent, the provisions of a particular section, in its terms *prospective*, do not take effect until such subsequent day.

The Court of Exchequer Chamber cannot, under 3 & 4 Will. 4, c. 42, s. 30, allow *interest* upon the damages recovered in a personal action in which error is brought, except when the writ of error is tested subsequently to the day on which that act received the royal assent. Although in an act of parliament it is expressly enacted that it shall *commence and take effect from a day named*, yet if the royal assent be not

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and take effect on the *first* day of June, 1833," the provisions of sect. 30 must be held to be applicable to this writ of error, notwithstanding the act did not receive the royal assent until after the teste of the writ; and he referred to *Freeman v. Moyes (a)*, in which the Court of K. B. held that sect. 31 applied to actions by executors, which were pending at the time of passing the act.

*Sed per Cur.*—Sect. 31 is not in its terms *prospective*, as regards the description of actions to which its provisions were to apply, but seems expressly intended to comprehend actions *brought* as well as actions *to be brought*. Sect. 30 is *prospective only* in its language, and cannot therefore apply to this case. Consequently interest cannot be allowed.

Rule accordingly.

(a) *Ante*, iii. 883; 1 Adol. & Ellis, 338.

GALLINI and others v. DOE d. JOHN ANDREW GALLINI,  
 (in Error.)

That construction of a will is to be preferred, which, consistently with the rules of law, gives effect to the greatest part of it.

Whether the doctrine that a general intent is to be preferred to a particular intent manifested in a will, is incorrect and vague, *quære*.

THIS case is fully reported upon the decision of the Court of King's Bench in Michaelmas term, 1834, *ante*, vol. ii. p. 619. A writ of error having been brought, and the errors argued here by *Lynch* for the plaintiffs in error, and by *Coote* for the defendant in error, before *Tindal, C. J.*, *Lord Abinger, C. B.*, *Park, J.*, *Gaselee, J.*, *Vaughan, J.*, *Bosanquet, J.*, *Parke, B.*, *Bolland, B.*, and *Gurney, B.*, the Court took time to consider of their judgment, which was now delivered by

TINDAL, C. J.—The question for our consideration is, whether the Court of King's Bench has put the proper construction upon the will of *Sir John Andrew Gallini* set out in the special verdict.

The Court of King's Bench has decided, that under this


will *Francis Cecil Gallini*, the eldest son of the testator, did not take an immediate estate-tail in possession, but an estate for life only ; but that his children took several estates-tail in undivided shares as tenants in common. And as *John Andrew Gallini* is the eldest son and heir of *Francis Cecil Gallini*, and in the character of heir in tail alone claims the whole of the property in question ; and as the defendants, being two brothers and one sister of *John Andrew Gallini*, claim, adversely to him, three undivided fifth parts of the property devised, the judgment must be affirmed if *Francis Cecil Gallini* took for life only, and not in tail. And we are all of opinion, that the construction put upon this will by the Court below is the right construction.

We think it unnecessary to enter into the discussion, in what cases and how far the *particular intent*, in a will, must give way to the *general intent* of the testator appearing upon the same instrument, when the two intents are inconsistent with each other ; because we think that the construction which has been put by the Court below upon this will, is the only one which can give effect, if not to the whole of the will, at all events to so much of it as can be legally carried into effect.

The question is, whether the children of the testator took estates-tail in the properties severally devised to them, or estates for life only, with remainder to their children in tail ; that is, considering the question with reference to the particular premises for which this ejectment is brought, whether *Francis Cecil Gallini* took in tail or for life ?

The testator first gives to *F. C. Gallini* an express estate for life in the share devised to him, with remainder to trustees to support contingent remainders, with remainder unto and amongst all and every his children who shall be living at the time of his decease, for and during their natural lives, as tenants in common. If we pause here, every provision in the will points directly *against* an estate tail in *F. C. Gallini*. There is an express estate for life, trustees to support contingent remainders, remainder to such children

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only as shall be living at his death, and to such children for life only, and to them as tenants in common. The will then, after providing for the case of a survivorship amongst the grandchildren, proceeds thus: "and from and after the decease of all the children of each of my said sons or daughters without issue, I give and devise the estates to them respectively limited as aforesaid, amongst all and every the lawful issue of such child or children (during their lives) as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining." It is very difficult, if not altogether impossible, to put any intelligible construction upon the whole of this clause. It is sufficient however to observe, that so far as we have proceeded at present, there is nothing to shew an intention that *F. C. Gallini* should take a larger estate than the estate for life which had been originally expressly devised to him, or that the estates for life expressly devised to the grandchildren, should be in any way defeated by enlarging the life estate of *F. C. Gallini*, into an estate tail. On the contrary, we hold the necessary construction of those words to be that of enlarging the estates for life previously given to the *grandchildren*, into estates-tail.

The clause then follows upon which the plaintiff mainly relies: "and for default and *in failure of issue of any of my said sons and daughters*, I give and devise the estate so limited to him or them dying without issue, to the survivors &c., and for default and *in failure of issue of all my said sons and daughters* except one, I give and devise all my freehold estates unto my only surviving son or daughter, his or her heirs and assigns, for ever."

Under this clause it is contended by the plaintiff that the sons and daughters of the testator took immediate estates-tail. The words undoubtedly, if they had occurred without any intervening devise to the grandchildren, would have been sufficient to create immediate estates-tail. But in the foregoing part of the will, not only has there been an express

devise to the grandchildren for life, but there are also words sufficient to enlarge such estates for life in the grandchildren into estates-tail. Admitting, therefore, the argument of the plaintiff's counsel to be just,—that if we give to the words “failure of issue,” when applied to the *grandchildren* surviving, the force of enlarging their estates for life into an estate-tail, we ought to give the same effect to the same words at the end of the devise, when applied to the *children* of the testator, and consequently that their estates for life must be similarly enlarged,—still the question arises, whether such estate-tail in the sons and daughters of the testator is *immediate*, or whether it is not *to be postponed* until after the estate-tail in the children of such sons and daughters has taken effect. If we consider the clause last referred to, as giving an *immediate* estate-tail to the children of the testator, the previous devise to the grandchildren as tenants in common in tail, is defeated; whereas if we hold the devise to the children of the testator to be an estate-tail, but to be a limitation *in remainder only*, the limitation for life to the children will take effect, and the devise to the grandchildren, as tenants in common in tail in remainder, and the general remainders over to the children of the testator in tail, will also take effect; and the descent of the property will be effectually secured in the line of the testator's family, as long, to use the testator's own expression, as “there shall be any stock or offspring remaining.” It is objected, that if the estate-tail were given to the grandchildren *as purchasers*, and one of them had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise as to such grandchild would have altogether failed, as a lapsed devise. It may be admitted that such would be the consequence; but as this event is supposed to happen in the lifetime of the testator, it would be open to him to make such new disposition of his property as he might think fit, on this change in his family taking place; and the argument therefore is not entitled to the same weight as where the construction put

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upon a will is such, that a failure in the manifest intention of the testator must necessarily follow, by an event which takes place after all control over the property, and all means of applying a remedy, has ceased. Again, it is clear that even in the case above supposed, after failure of the issue of all the other grandchildren, the issue of the grandchildren, so dying in the lifetime of the testator, would ultimately take under the estate-tail limited to the sons and daughters of the testator, which would then come into operation. It may indeed be urged, that a difficulty of a similar nature may take place under the construction adopted by the Court, by the failure of an estate on a contingency which may arise *after the death* of the testator. For suppose the grandchildren are held to take as purchasers in tail, then the devise being limited to such grandchildren as shall be living at the death of their respective parents, if any grandchild should die leaving his parent, and leaving issue, such issue would not take. To which difficulty the only answer is, that this is an *express contingency* created by the testator himself, and he cannot, upon any principle of construction, be held to have been insensible to that which was its natural and necessary consequence; and in this case also, as in the last, the issue of the grandchild so dying might ultimately take under the devise in tail, in remainder, to the children of the testator.

The cases of *Murthwaite v. Jenkinson* and *Wotton v. Andrews*, relied upon for the plaintiff, in the argument before us, have been so well and clearly distinguished from the present, in the judgment given by the Court of King's Bench, that we feel it unnecessary to add any thing upon that point, or indeed to make any further observations on the case, except that we think the judgment of that Court the right judgment, inasmuch as it proceeds upon that construction of the will, which gives the utmost possible effect to all and every the devises contained therein.

Judgment affirmed.

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*And see TRUSTEE, 1.*

I. *What shall amount to.*

An offer of a cognovit after action brought, will not support a count upon an account stated. *Spencer v. Parry.* Page 770

### ACKNOWLEDGMENT OF DEBT.

*See LIMITATIONS, STATUTES OF, IV.*

### ADMINISTRATION.

- I. *Effect of Possession by next of kin, without grant of.*  
*See SETTLEMENT, II.*

### ADMINISTRATOR.

- I. *Liability of.*  
*See BUILDING ACT—Costs, 3, 4.*

### ADVERSE POSSESSION.

*And see EJECTMENT, 4—LIMITATIONS, STATUTES OF, I. II.*

I. *What shall amount to.*

1. The holding over for twenty years, by lessee for years determinable on lives, at a nominal rent, who, at the commencement of such holding over, falsely asserts that one of the cetteux que vies is alive, but omits to pay the reserved rent, is not an adverse possession barring the entry or ejectment of the reversioner. *Res v. The Inhabitants of Axbridge.* 477
2. So although the reversioner has notice of the cesser of the term, and grants a fresh lease to another person, who neglects to enter for more than twenty years. *Ibid.*
3. A *wrongful continuation* of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an *adverse possession* as will, under the Statute of Limitations, create a bar to an entry or to an action of ejectment. *Doc d. Parker and others v. Gregory.* 308
4. As where husband of tenant for life holds over twenty years after her decease. *Ibid.*

**AFFIDAVIT.**

*And see* CORONER.—EVIDENCE,  
14, 15.

Upon a statement of counsel that he had moved for a rule to set aside an award, under a mistaken supposition that an affidavit deposing to certain facts had been sworn, the Court, on the day after granting a rule nisi, gave leave for the rule to be drawn up as upon reading such affidavit, on condition that it should be sworn on that same evening. *Perring v. Kymer.*  
477

**AFFILIATION.**

*See* BASTARDY.

**AGENT.**

*And see* INSURANCE, 4.

**I. Evidence of Authority.**

*A.*, the wife of *B.*, orders goods of *C.*, to be sent to the house of *D.*, a relation of *C.*'s. *C.* on the following day sees *B.*, and *B.* accepts a bill for the price, which he pays at maturity. At the time of paying the bill, *B.* orders goods of *C.* to a small amount for himself. *A.* subsequently orders other goods of *C.*, to be sent as before to the house of *D.*:—Held, that there was evidence to go to a jury, of *B.*'s having so conducted himself as to lead *C.* to believe that *A.* had *B.*'s authority to order the last-mentioned goods. *Filmer v. Lynn.*  
559

**AGREEMENT.****I. Where provable by parol, though reduced into writing.**

*See* EVIDENCE, 18, 20—SETTLEMENT, III. 13.

**II. When liable to Stamp.**

*See* STAMP, 1.

**AMBIGUITY.**

*See* EVIDENCE, 17.

**AMENDMENT.**

*See* PLEADING, 20.

**ANCIENT LIGHTS.**

A party may so alter the mode of enjoyment of ancient lights, as to lose the right to them altogether. *Garrett v. Sharpe.*  
834

**ANCIENT RENTS AND RESERVATIONS.**

*See* POWER.

**ANNUITY.****I. Memorial.**

1. An annuity deed, the memorial of which does not set forth, with precision, the form in which the consideration was paid, is void. *Lewis and wife v. Hooper.*  
318
2. The inaccuracy of a statement in the memorial, may be brought before the Court by *affidavit*, as a ground for setting aside the securities. *Ibid.*

**APPEAL.****I. Who may appeal against Overseers' Accounts.**

*See* OVERSEER, I.

**II. Sufficiency of Statement of Grounds of.**

*See* HIGHWAY, II.

**III. Appeal against Poor-rate, how to be disposed of, when Rate abandoned.**

*See* POOR-RATE, IV.

**APPRENTICE.**

*And see* EVIDENCE, 4—SETTLEMENT, I.

**I. Stamp on Assignment.**

*See* STAMP, II.



# ARBITRAMENT.

*And see* COSTS, 11, 12, 13.

## I. Submission.

*Submission of Partnership Matter to Arbitration by one Partner.*

*See* PARTNER.

## II. Award Stamp.

*What an Award within meaning of Stamp Act.*

*See* STAMP, 3.

*What to be considered Part of an Award with reference to Amount of Stamp.*

*See* STAMP, 4.

## III. Costs, where may be awarded.

1. Where by an agreement of reference, after reciting various disputes and claims by *A.* and *B.*, (the parties to the agreement,) and that an action of trespass has been commenced by *A.* against *B.*, the aforesaid matters are referred to *C.*, and it is agreed that all costs shall abide the event of the award, *C.* cannot make any award as to the costs. *Boodle v. Davies.* 788
2. And unless *C.* decides all the matters referred to him in favour of one party, the plaintiff and defendant must pay their own respective costs; even though the arbitrator decides that the defendant has committed a trespass on the plaintiff's land. *Ibid.*

## IV. Award, where sufficient.

3. After declaration and before plea, a cause and all matters in difference between the parties, were, by a judge's order, made by consent, referred to arbitration,—the costs to abide the event of the suit. The arbitrator awarded that a verdict should be entered for the plaintiff with 55*l.* damages; and that on all the matters in difference be-

tween the parties, there was not any sum of money due to either of the parties:—Held, that this was not equivalent to an award that the plaintiff should pay the defendant 55*l.*; and the Court therefore refused an attachment to enforce the payment either of the 55*l.* or of the costs. *Donlan v. Brett.* 854

4. In an action for work and labour, money paid, &c. against two partners, all matters in difference in the cause between the parties are referred to a legal arbitrator. In the particulars of demand in the action, and before the arbitrator, credit is claimed by the plaintiff for the amount of certain checks given to one of the defendants. The arbitrator awards a certain sum to the plaintiff, but specially states in his award that the checks, or the money paid in respect thereof, were claimed as matters in difference in the cause, and declares and determines that they are not matters in difference in the cause:—Held, that the award is not final, and is therefore void. *Samuel and Phillips v. Cooper and Levey.* 520
5. By an agreement of reference between *A.* and *B.*, which stated that *A.* claimed a yard and a pump therein as his exclusive property, but that *B.* had, after notice not to do so, entered the yard and taken water from the pump, and that there was a hedge and ditch dividing the lands of *A.* and *B.*, which *A.* alleged that *B.* had removed into his (*A.*'s) land; all matters in difference were referred to *C.*, who was further empowered to direct how, and by whom, and in what manner, the yard and pump and hedge and ditch should thereafter be enjoyed and occupied, and who should have the care and management thereof. *C.* awarded that the yard and pump were the sole and exclusive property of *A.*, except that *B.* had a right to take

water from the pump, and to have ingress and egress into and from the yard for that purpose; and further, that the pump should thereafter be considered as *belonging to A. and B. jointly*, and be repaired at their joint expense; and that B. had not removed the hedge and ditch into his land, but that thereafter the hedge should be kept in repair by B., who for that purpose should be at liberty to take mud from the ditch, but that subject to such privilege the ditch should thereafter be considered as the *exclusive property of A.*:—Held, that the direction as to the future enjoyment &c. is not inconsistent with the other part of the award; and held, that the arbitrator had not exceeded his authority by such direction. *Boodle v. Davis.* 788

#### V. Attachment for Non-performance of.

6. Matter of objection not apparent upon the face of an award,—as an omission to adjudicate upon a matter in dispute brought before the arbitrator,—cannot be shewn for cause against a rule nisi for an attachment for non-performance of the award. *M'Arthur v. Campbell.* 208

#### VI. Award, Effect of.

7. Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases, closes all accounts between the parties up to the time of the submission. *Trimmingham v. Trimmingham.* 786

#### VII. Setting aside Awards.

8. A rule nisi to set aside an award, ought to state specifically the particular grounds of objection. *Boodle v. Davis.* 788
9. It is not sufficient to state that

the arbitrator has "exceeded his authority," or that "the award is uncertain and not final." *Ibid.*

#### ARREST.

- I. *Whether Arrest after time given for Payment of Debt, legal.*

See PRACTICE, 1.

#### II. Money paid under Illegal Arrest, how recoverable.

1. Where a party arrested while privileged from arrest, pays money into Court by permission of a judge, in order to obtain his discharge, he is entitled, upon application to the Court, to have the money returned to him. *Pitt v. Coombe.* 535
2. But such application must be made within a reasonable time after the arrest, or the delay must be satisfactorily accounted for. *Ibid.*
3. The pendency of a motion to set aside the proceedings for irregularity, was held to be a satisfactory reason for having deferred the application for several terms. *Ibid.*

#### ASSESSED TAXES.

- I. *What a sufficient Demand and Refusal to warrant Distress.*

1. In order to authorize a levy under 43 Geo. 3, c. 99, s. 33, for arrears of assessed taxes, it is not necessary that those arrears should have been demanded by the collector in person, upon the householder in person, or that there should have been a direct refusal of payment to the collector in person: but it is sufficient if a demand have in fact been made by the collector or a person authorized by him, and the householder has refused payment, whether on the ground of inability or for any other cause. *Rex v. Ford and others.* 461

2. Nor is it necessary that the collector should, in the demand, have specified the exact sum. *Ibid.*

II. *Rights and Duties of Collectors upon taking Distresses for.*

3. A collector of taxes may distrain without having his warrant with him, *semble*. *Rex v. Clarke and another.* 671
4. A collector of taxes has no right to take a constable or other person with him into the house of a party of whom he is about to demand the payment of arrears of taxes, and upon whom he is about to levy a distress for such arrears, if necessary; unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted. *Ibid.*
5. Where, however, *A.*, a collector, unwarrantably, but without any objection being made, introduces *B.*, a constable, into the house of *D.*, a person from whom he demands taxes,—and afterwards, reasonable ground to apprehend violence arising, the collector introduces *C.*, another constable, upon whom *D.* commits an assault; it is no answer to an indictment against *D.*, for the assault on *C.* in the execution of his duty, that the collector had wrongfully introduced *B.* *Ibid.*
6. *A.*, collector, demands taxes due from *D.*, the owner of a house, and intimates that in case of non-payment, he shall distrain: upon which *D.* threatens *A.* with personal violence; but ultimately promises to send the amount on a certain day. This promise not being performed, *A.* goes again to *D.*'s house, and demands the taxes of *D.* *D.* leaves the room in which *A.* is, and fastens the outer door:—Held, that *A.* was justified in unfastening the door and introducing constables: and

held, that upon *D.*'s returning into the room after the introduction of the constables, accompanied with a number of men, and commanding *C.*, one of the constables, whom he knew to be such, to leave the house, it was the duty of *C.* and the other constables to remain. *Ibid.*

ASSETS.

See BUILDING ACT, 2.

ASSIGNMENT.

See STAMP, II.

ASSUMPSIT.

And see ACCOUNT STATED—MASTER AND SERVANT—MONEY PAID—TRUSTEE.

I. *Implied Promise by Vendor, upon Abandonment of unwritten Contract for Sale of Lands.*

1. Upon the abandonment of an unwritten contract for the sale of land, entered into at an auction, for defect of title, the deposit money and money paid by the purchaser to the auctioneer, for the purchaser's moiety of the auction duty, may be recovered.—*Gosbell v. Archer.* 485
2. But expenses of investigating the title cannot be recovered without proof of a written contract binding on the vendor. *Ibid.*
- Nor interest upon the deposit. *Ibid.*

II. *Implied Promise to indemnify or contribute.*

See INDEMNITY.

III. *Implied Promise by Banker to pay Check.*

See BILLS AND NOTES, 3, 4.

ATTACHMENT.

See ARBITRAMENT, V.

## ATTORNEY.

And see EVIDENCE, 12—PRACTICE, X.

I. *Amendment of Notice of Application for Admission.*

1. Where, in a notice, given at the commencement of Easter term, of the intention of *A.* to apply to be admitted an attorney of K. B., the name of another individual was inserted by mistake in lieu of the name of the person with whom *A.* had served his articles,—the Court, upon an application in Easter term, allowed the notice to be amended, in order that *A.* might be admitted on the last day of Trinity term. *In the matter of Clarke.* 709

II. *Negligence of.*

See NEW TRIAL, 2.

III. *Authority of Court over.*

2. When deeds, &c. of a testator are delivered to an attorney, in that character, by an executor to whom the testator devised his property in trust for other persons, the attorney cannot, against an application by the executor to the Court to compel him to return those deeds, excuse himself on the ground of an equitable interest under the trusts personally vested in him, the attorney. *In the matter of Walmesley, Gent., one &c.* 543
3. Where an attorney had obtained from an aged lady, in the absence of her attorney, her signature to a paper, whereby she agreed to abandon a judgment in ejectment obtained by her by default of the tenant in possession, and to allow the question of the title to be fairly tried as between her and the attorney's client, landlord of the tenant in possession,—the Court compelled him to give up the instrument to be cancelled. *In the matter of Oliver.* 471

IV. *Effect of Neglect to take out Certificate for less than a Year.*

4. An attorney may maintain an action for business done at a time when he was uncertificated, provided a certificate be taken out by him before the end of a year after the expiration of the period to which the preceding certificate extended. *Bowler, Gent., one &c. v. Brown.* 17

V. *Effect of Neglect to take out Certificate for more than a Year.*

5. A person who has been regularly admitted as an attorney, but who is off the rolls by reason of his having neglected to take out his certificate for one whole year, is not an "unqualified person" within the meaning of sect. 11 of 22 Geo. 2, c. 46. *In re Ross and Hodgson.* 763
6. But he may be proceeded against by virtue of the general jurisdiction of the Court over its officers, if he takes upon himself to act as an attorney, *semble.* *Ibid.*

VI. *Who an unqualified Person within 22 Geo. 2, c. 46, s. 11.*

7. Whether a person struck off the roll for misconduct is an unqualified person within 22 Geo. 2, c. 46, s. 11, *quære.* *In re Ross and Hodgson.* 763

And see *ante*, 5, 6.

VII. *Striking off the Roll.*

And see *Ross and Hodgson, in re*, 763, *ante*, 7.

8. A superior Court is bound, upon summary application under 22 Geo. 2, c. 46, s. 11, to order an attorney, who is shewn to have allowed an unqualified person to practise in his name, in such Court, to be struck off the roll. *In the matter of Palmer, Gent., one &c.* 529
9. But that Court only from which

the abused process issues, can, upon summary application under this enactment, order the attorney to be struck off the roll. *Ibid.*

10. Where, upon such an application under this statute, the Court refers it to the Master to say, whether in any instance the unqualified person has, with the permission of the attorney, practised in that Court, the rule can be made absolute only upon its appearing by the Master's report that the case is within the statute; not upon the ground of a general jurisdiction of the Court over its officers. *Ibid.*

#### AWARD.

See ARBITRAMENT.

#### BAIL.

##### I. In Civil Cases.

See PRACTICE, 2.

##### II. In Criminal Cases.

The Court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon the coroner's inquest with manslaughter, without an affidavit of what took place before the coroner. *The King v. Mills.* 6

#### BAILMENT.

See TROVER, 2.

##### I. Liability of Bailee, for Negligence,

1. Upon a bailment without reward, in order that an act may be done by the bailee for the sole benefit of the bailor, such bailee (or mandatory) is liable only for gross negligence.
2. What shall amount to gross negligence, in such a case, is a question for the jury.
3. An admission by an innkeeper that he left money entrusted to him for the purpose of taking up

a bill, in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury. *Doorman v. Jenkins.* 170

##### II. Plea of the Statute of Limitations, in Trover by Bailor against Bailee, how supported.

See LIMITATIONS, STATUTES OF, II.

##### III. Goods on Premises of Bailee, where privileged from Distress.

See DISTRESS, III.

#### BANKER.

When bound to give Notice of Dishonour of Check paid in by Customer.

See BILLS AND NOTES, 8, 9, 10, 11.

#### BANKRUPT.

When Depositions conclusive Evidence of Trading, &c.

See EVIDENCE, 8, 9.

#### BARON AND FEME.

See HUSBAND AND WIFE.

#### BASTARDY.

1. To give jurisdiction to magistrates to make an order of affiliation under 18 *Eliz.* c. 3, s. 2, it is necessary that it should be for the relief of a parish in which the illegitimate child was born, and to which it is chargeable. *Rex v. Wilson.* 243
2. A fraudulent removal of an unmarried pregnant woman, settled in A., to an extra-parochial place, by the putative father, does not make a birth in the extra-parochial place to be, in contemplation of law, a birth in A., so as to entitle that parish to relief under 18 *Eliz.* c. 3, s. 2. *Ibid.*

3. Nor, where the removal is to another parish. *Ibid.*
4. An order of affiliation, in which the birth of an illegitimate child is alleged to have taken place in A., and which is confirmed by an order of sessions, subject to a case in which the birth is stated to have occurred in B., to which the putative father had fraudulently removed the mother, who was settled in A.,—is bad, on the ground (inter alia) that it contains a recital of a false fact. *Ibid.*

### BENEFICE.

See DILAPIDATIONS.

### BILL OF PARTICULARS.

See DEBTOR AND CREDITOR.

### BILLS AND NOTES.

And see USURY, II.

#### I. Transfer of Property in.

1. A promissory note, payable to S., she being the wife of A., may be indorsed by A. alone. *Mason v. Morgan.* 46
2. In assumpsit for money had and received, where it is shewn that the defendant admitted that he had received a bill, drawn on a third party, to which the plaintiff was entitled, and that he had paid it into his bankers on his own account, the bankers' clerk cannot be called to prove that the defendant received benefit from a bill of a similar description, the bill itself not being produced, nor its absence accounted for. *Atkins v. Owen.* 123
3. When a customer pays to his bankers a check drawn upon them by another customer, he must, in order to make them liable at all events, demand payment, or request that the amount may be placed to

his credit. *Boyd v. Emmerson and others.* 99

4. An assent on the part of the banker to such a demand or request, would raise an implied promise to pay or give credit for the amount. *Ibid.*

#### II. What a Payment of.

5. Credit given to the holder of a bill, by the party ultimately liable, is tantamount to payment. *Atkins v. Owen.* 123
6. *Secus*, as to credit given by a party not ultimately liable, as where the credit was given by the banker of the holder, such banker not being a party to the bill. *Ibid.*

#### III. Proof of Consideration, when required in the first instance.

See PLEADING, 22.

#### IV. Notice of Dishonour.

7. Held, that notice of dishonour of a bill of exchange, is sufficient, if given by any person who is a party to the bill; and that it need not proceed either immediately or derivatively from the holder. *Chapman v. Keene.* 607
8. When a customer pays into his bankers, in the ordinary way, a check drawn upon them by another of their customers, the bankers are entitled to the same time for ascertaining whether the check will be paid, and giving notice of dishonour (in case it be resolved by them not to pay the check), as in the case where the check is drawn upon other bankers. *Boyd v. Emmerson and others.* 99
9. Therefore in such a case, no promise to pay the check, on the part of the bankers, will be implied from the absence of earlier notice. *Ibid.*
10. A. and B. are respectively customers of C. a banker. A. goes

to C.'s bank at a quarter before one on Monday, and gives C.'s managing clerk directions as to the payment of a bill, and, whilst the clerk is making a memorandum of those directions, lays on the counter a check drawn by B. on C., and says, "place this to my account," or "credit." No intimation as to whether the check would or would not be paid was given by the clerk. The clerk did not debit B. with the amount, or place it to A.'s credit, or cancel the check. B. having overdrawn his account, inquiries were made on Tuesday, the result of which was, that C. resolved not to pay the check. The check, with notice of dishonour, was sent to A. at his residence, by seven o'clock p. m. on Tuesday : Held, sufficient notice of dishonour. *Ibid.*

11. *Semble*, that as the post did not leave the town in which the bank was situate until seven o'clock, p. m., a notice of dishonour received by A. at his residence at a few miles distance, at seven o'clock, was *earlier* than necessary. *Ibid.*

**V. When original Rights of Parties, suspended or destroyed by Bill or Note.**

12. Where a bill of exchange drawn and accepted for value, is altered by the drawer and thereby becomes void, the drawer may after the day of payment has passed, in case of dishonour, sue the acceptor upon the original consideration. *Atkinson v. Hawdon.* 409
13. A promissory note given by the tenant to his landlord for rent, does not of itself suspend the right of distress until the note is due. *Davis v. Gyde.* 462

**BRIBERY.**

**I. Liability of Party bribing.**

1. The penalty imposed by the Bri-

bery Act (2 Geo. 2, c. 24, s. 7,) upon persons who by any gift or reward, &c. corrupt any person to give his vote, or to forbear to give his vote, at an election for members of parliament, may be recovered from a man who makes a corrupt agreement with a voter to give his vote to a particular candidate, and gives money to the voter in performance of his part of the agreement, although in fact the voter gives his vote to the opposite candidate. *Henslow v. Fawcett.* 585

2. So, even though the voter, at the time of making the corrupt agreement, actually intended not to perform it, but to vote for the opposite candidate. *Ibid.*

**II. Liability of Party bribed.**

3. A voter who agrees or contracts, for any money or other reward, to give or forbear to give his vote at an election, is liable to the penalties of 2 Geo. 2, c. 24, s. 7, though he never intended to perform the corrupt agreement. *Ibid.*

**BRIDGE.**

*What a County Bridge.*

1. Though there cannot be a bridge which the county is bound to repair, where there is no *cursus aquæ*, yet it is a question of fact in each case, whether an arch thrown over a *cursus aquæ*, is such a bridge or not; *semble.* *Res v. Inhabitants of Whitney.* 594
2. The fact of the arch or bridge having no *parapets*, does not of itself prevent its being a county bridge. *Ibid.*

**BOROUGHES.**

*Exemption from County Rate.*

See JUSTICES, 1.

**BUILDING ACT.***Expenses of building Party-wall.*

1. An administrator, who, as such, receives the improved rents of a house in the metropolis, from the tenant in possession, is liable, under s. 41 of the Building Act (14 Geo. 3, c. 78,) to be sued for the moiety or other proportional part of the expense of building a party-wall, erected by the owner of the adjoining house in pursuance of the act. *Thacker v. Wilson.* 658
2. *Semble*, that these expenses are in the nature of a lien upon the improved rent, and that therefore to the extent of such moiety or other proportional part, the rent is not assets in the hands of the administrator. *Ibid.*

**BUTCHER.**

*See* DISTRESS, III.

**CEPI CORPUS.**

*Effect of Return of.*

*See* EVIDENCE, 5.

**CALENDAR OF PRISONERS  
SIGNED BY JUDGE.**

*Effect of Service of, upon Sheriff.*

*See* SHERIFF, 1, 2, 6, 7.

**CANAL COMPANY.**

- I. *What a sufficient Refusal to perform a Duty, to warrant the issuing of a Mandamus.*

*See* MANDAMUS.

- II. *By what Words exempted from Poor-rate.*

*See* POOR-RATE, 5.

- III. *What words sufficient to import into subsequent Act, exemption from Poor-rates given by former Act.*

*See* POOR-RATE, 6.

**CARRIER.**

*Effect of Part-delivery of Goods by.*

*See* STOPPAGE IN TRANSITU.

**CERTIFICATE, ATTORNEY'S.**

*Neglect to obtain, Consequence of.*

*See* ATTORNEY, IV. V.

**CERTIFICATE OF JUDGE.**

*To deprive Plaintiff of Costs.*

*See* COSTS, 1.

**CHALLENGE.**

*See* CRIMINAL INFORMATION.

**CHECK.**

*See* BILLS AND NOTES, 3, 4, 8, 9, 10.

**CLERK.**

*See* PARISH CLERK—WITNESS, 1.

**COAL MINE.**

*Where ratable.*

*See* POOR-RATE, 4.

**COGNOVIT.**

*Effect of Offer of.*

*See* ACCOUNT STATED.

**COLLECTOR.**

*See* ASSESSED TAXES, I. II.

**COMPENSATION.**

*See* RAILWAY ACT.

**COMPUTATION OF DAYS.**

*See* JUSTICES, 8, 9.

**CONDITION PRECEDENT.**

*See* DEED, 3.



**CONSIDERATION FOR NOTE.**

*Proof of, by Plaintiff, in first instance.*  
*See PLEADING, 22.*

**CONSOLIDATION RULE.**

*Effect of, as against Plaintiff.*  
*See INSURANCE, II.*

**CONSTABLE.**

*See ASSESSED TAXES, 4, 5, 6.*

**CONTRACT FOR SALE OF LAND.**

I. *What the intended Purchaser may recover upon failure of Title, where valid Contract in writing.*

II. *Where no valid Contract in writing.*

*See ASSUMPSIT, I.*

**CONTRIBUTION.**

*Identity of, with Indemnity.*  
*See INDEMNITY, 3, 4.*

**COPYRIGHT.**

*How acquired.*

1. No copyright vests in the engraver of any print, under 17 Geo. 3, c. 37, unless the date of the first publication thereof be engraved thereon. *Brookes v. Cock.* 652
2. In Case for pirating such print, it is therefore a good plea in bar—that the plaintiff has not the sole right of printing, &c., by reason that no date is engraved on the print. *Ibid.*

**CORONER.**

*Depositions.*

The Court will not grant a rule nisi to remove the depositions taken before a coroner, and to bail a party charged, upon the coroner's

inquest, with manslaughter, without an affidavit of what took place before the coroner. *Rex v. Mills.* 6

**COSTS.****I. Plaintiff's Costs.**

(a) *Where Judge may certify to deprive Plaintiff of Costs.*

1. Where in trespass against A. and B., A. pleads the general issue, which is found for him, and B. suffers judgment by default, upon which one farthing damages are assessed, it is competent to the judge to certify under 43 Eliz. c. 6, to deprive the plaintiff of his costs. *Harris v. Duncan and others.* 63

**II. Defendant's Costs.**

(a) *In Actions by Executors.*

2. Upon a declaration containing an account stated with the plaintiff's as executors, though it also contains counts on promises to the testator, the defendant is, in case of a nonsuit, entitled to costs as of course. *Spence v. Albert.* 385
3. The discretion as to costs in actions by executors, given to the Court or a judge of any of the superior Courts, by 3 & 4 Will. 4, c. 42, s. 31, extends only to cases in which executors were, before that enactment, exempted from the payment of costs. *Ibid.*

(b) *Costs, when grantable under 43 Geo. 3, c. 46, s. 3.*

4. A defendant applying for costs under 43 Geo. 3, c. 46, must shew a *prima facie* case of absence of reasonable and probable cause for arresting for the amount sworn to. *Nicholas v. Hayter.* 882
5. A great disproportion between the sum recovered and the amount sworn to, is a sufficient *prima facie* case. *Ibid.*
6. And it is no answer for the plain-

tiff to allege, that but for the death of one material witness, and the absence of another, he could have proved a debt to the full amount.

*Ibid.*

7. A party who has a just demand against another, has not reasonable and probable cause to arrest him, unless he has *legal evidence* to support his demand.

*Ibid.*

8. Where a plaintiff recovers a sum less than the amount for which he arrested and held the defendant to bail, and it appears that his only probable cause of action was not bailable, (being for unliquidated damages), the defendant is entitled to costs, under 43 *Geo.* 3, c. 46, s. 3. *Beare v. Pinkus.* 846

(c) *Where not grantable.*

9. Where a defendant, arrested for 25*l.*, pleads that the plaintiff is entitled only to 11*l.*, which he pays into Court, under the rules of E.T. 1834, Reg. 17, and the plaintiff accepts that sum, the defendant cannot have costs under 43 *Geo.* 3, c. 46. *Brookes v. Rigby.* 3

10. The Court has no power under 43 *Geo.* 3, c. 46, to award costs to the defendant, except in cases where the plaintiff has recovered, by *judgment* only, a less amount than the sum for which he had arrested the defendant. *Holder v. Raith.* 466

11. Therefore, they have no jurisdiction under this statute, in cases in which the recovery has been by an *award*, upon a reference before issue joined. *Ibid.*

12. So, although in the order of reference it is expressly agreed that the costs of the action, of the reference, and of the award, shall abide the event of the suit, in like manner as upon a verdict. *Ibid.*

13. *Dubitatur*, whether, if in such a case the parties consented that judgment should be entered up for the sum awarded, with a view to re-

serve the jurisdiction of the Court under the statute, the Court would accept the power. *Ibid.*

III. *Costs of particular Issues.*

14. Whether (under Reg. H. 2 *W.* 4, s. 74, or H. 4 *W.* 4, Reg. 1, 7,) particular costs incurred in relation to the trial of the cause, are referable to one issue or another, is a question of fact for the decision of the Master alone. *Doe d. Smith and Payne v. Webber.* 381

15. The Court ought not to be called upon to inquire into the correctness of the Master's decision upon such question. *Ibid.*

16. Where, in ejectment upon the several demises of *A.* and *B.*, the defendant being ignorant of the title of *A.*, goes to trial prepared with evidence in answer to the title of *B.* only, and the plaintiff's counsel disclaims the title of *B.*, (the issue in respect of whose demise is therefore found for the defendant,) and obtains a verdict under the demise from *A.*, the Master is justified in allowing the defendant the costs of the evidence so prepared, although, at the trial, the witnesses were examined by the defendant's counsel, and their evidence offered as against the title of *B.*, but rejected as inapplicable, and although the defendant afterwards moved for a new trial, on the ground of the rejection of the evidence, and the Court refused the rule on the ground of inapplicability. *Ibid.*

17. In a count in a declaration for a libel, various parts of one continuous article, in which the plaintiff is not mentioned by name, are applied to him by innuendoes. Under the general issue pleaded, the jury negatived the greater part of the innuendoes. The plaintiff is entitled to costs in respect of that part only of the libel which is found to apply to him. *Prudhomme v. Fraser,*

IV. *Who may award Costs.*

*And see* ARBITRAMENT, 1, 2—SESSIONS, III.

18. A judge at chambers has power to give costs upon a summons; but this power will only be exercised in extreme cases. *In the matter of arbitration between Bridge and Wright.* 5

COUNTY BRIDGE.

*See* BRIDGE.

COUNTY COURT.

- I. *Pleading two Pleas to Action in.*  
*See* PLEADING, VIII.

- II. *Plea to Action in Superior Court, that Matter cognizable in County Court.*

*See* PLEADING, III.

COUNTY PALATINE.

*Court of Common Pleas at Lancaster.*

*See* PRACTICE.

COUNTY RATE.

*Where leviable.* *See* JUSTICES, 1.

COURT OF QUARTER SESSIONS.

*See* SESSIONS.

COURT OF REQUESTS.

*See* PRACTICE, V.

COVENANT.

*And see* PLEADING, 1, 2, 14.

1. The converting of a demised house into a *lunatic asylum*, is not a breach of a covenant not to "use or exercise any *trade or business* of butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, soap-boiler, or any other *offensive trade*." *Doe d. Wetherell v. Bird.* 285

2. In such a covenant, the words "*trades*" and "*businesses*" must be taken to be used in different senses, and the former must be confined to businesses conducted by *buying and selling.* *Ibid.*

CRIMINAL INFORMATION.

I. *What sufficient Ground for.*

Upon a motion for a criminal information against *A.* for challenging *B.*; an affidavit stating that in a correspondence between them, *A.* intimated an intention, after the settlement of accounts between himself and *B.*, to require an apology for offensive expressions contained in a letter received by him from *B.*, or "such satisfaction as is usual on such occasions between gentlemen," and that afterwards *C.*, a relation of *A.*, came to *B.* with a letter of *B.*'s in his hand,—settled the account by paying the balance due from *A.* to *B.*,—and after saying that he came in consequence of the letter in his hand, delivered a hostile message as from *A.*,—was held insufficient to connect *A.* with the challenge; and therefore the Court refused the rule. But the Court granted a rule nisi against *C.* *The King v. Young-husband.* 850

- II. *When grantable against Magistrates.*

*See* JUSTICES, 6.

CUSTOM.

*And see* PENAL ACTION.

*When valid.*

A custom in the city of London, that a freeman of the city shall not set on work, in the manual occupation of a butcher, a person who is a foreigner to the liberties of the city, is good. *Shaw v. Poynter.* 290

**DAMAGES, UNLIQUIDATED.****I. Arrest for.***See* COSTS, 8.**II. Plea of Tender to Action for.***See* TENDER.**DEBT.***See* MASTER AND SERVANT.—PLEADING, CIVIL, VII. (a) (b).**DEBTOR AND CREDITOR.***And see* INSOLVENT DEBTOR—PRACTICE, CIVIL, 1.*Appropriation of Payments.*

1. The vendor of spirits in small quantities, for the price of which he is disabled from recovering by 24 Geo. 2, c. 40, s. 12, who has another demand against the vendee, may apply a payment made to him by his debtor to the price of the spirits, unless at the time of payment the debtor direct a different appropriation of it. *Philpot v. Jones.* 14
2. In the absence of such contemporaneous directions by the debtor, the creditor may so apply the payment at any time afterwards. *Ibid.*
3. And a jury may, upon the trial of an action brought by such creditor against the debtor, find that such appropriation has been made, although in the particulars of demand the plaintiff has stated that the action was brought to recover the amount of his bill, being the whole of his original demand including the charges for spirits. *Ibid.*

**DEED.****I. What a Part of.**

1. *Seem*, that words at the end of a deed, following the "In cujus rei testimonium," &c. form no part of the deed. *Pearce v. Morrice.* 48

**II. Construction of.**

2. *Quære*, whether a power to enter

upon copyhold lands, is necessarily to be implied from a power to sell and dispose of such lands in case of non-payment of money advanced by way of mortgage. *Watson v. Waltham.* 537

3. Where, by a mortgage deed, A. covenants to surrender copyhold land to B., upon trust, in case of default in payment of money lent by C. to A., to sell and dispose of the premises when C. shall think proper, a request by C. is a condition precedent to the power of B. to sell. *Ibid.*

**III. Possession of.***See* ATTORNEY, 2.**DEFAMATION.****I. Imputation of Felony.**

1. *Seem*, that the words "You have robbed me of one shilling *tan money*," are not actionable, as the Court cannot take notice that "*tan money*" may be the subject of robbery. *Day v. Robinson* (in error). 488
2. The import of the term "*tan money*," cannot be supplied by an innuendo unsupported by a corresponding inducement. *Ibid.*

**II. In Party's Profession.**

3. In an action on the case for defamation, for words charging a physician with adultery, it is not sufficient (unless special damage be alleged,) to state that the misconduct was imputed to the plaintiff in his profession. *Ayre v. Craven.* 220
4. The declaration ought also to set forth in what manner such misconduct was connected, by the speaker, with that profession. *Ibid.*
5. Therefore, where the declaration alleged that words containing such an imputation, were spoken of and concerning the plaintiff carrying on the profession of a physician, and

of and concerning him in his profession, without more, judgment was arrested. *Ibid.*

6. Whether words imputing to a physician that he had taken advantage of the opportunities afforded him by his profession, to commit acts of adultery, would be actionable without special damage, *quære*. *Ibid.*

### III. Entire Damages, upon bad and good Counts.

7. No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action. *Day v. Robinson*, (in error.) 488
8. And where a judgment had in fact been given for the plaintiff, to recover damages so assessed, a venire de novo was awarded. *Ibid.*

### DEMURRER, SPECIAL.

See PLEADING, 8, 35.

### DEVISE.

#### Construction of.

1. *A.* devises a house, &c. "to *B.* his heirs and assigns for ever, with the intention that he may enjoy the same during his life, and by his will dispose of the same as he thinks proper:"—*B.* takes an estate in fee, and not an estate for life with a testamentary power of appointment. *Doe d. Herbert v. Lewis and Thomas*. 696
2. Devise to *A.* for life, remainder to *B.* in tail-male. During *A.*'s life *B.* dies leaving a daughter *C.*, who also during the life of *A.* dies leaving a son *D.*; *A.* dies: *D.* cannot take. *Doe d. Parker v. Gregory*. 308
3. Devise to *A.*, *B.*, *C.*, and *D.*, successively in strict settlement, proviso that if the title of Earl of *S.* shall come to *A.*, *B.*, *C.*, or *D.*, (devisees for life) or their sons, within the

period of the lives of the said *A.*, *B.*, *C.*, or *D.*, or within the term of twenty-one years after the decease of the survivor of them, then and in such case as and when the title of the said Earl of *S.* shall come and fall into possession to him or them, the estate which he or they shall then be entitled unto in all and every the manors hereinbefore devised, shall cease and determine and become void, and the same manors shall immediately thereupon go to the person or persons who, under the limitations aforesaid, shall then be next in remainder expectant on the decease and failure of issue male of the person to whom the title shall so descend or come, in the same manner as such person or persons so in remainder as aforesaid would take the same by virtue of the devise, in case he or they to whom the title shall come and fall in possession as aforesaid, was or were actually dead without issue. Held, that although the words from "time to time" are not inserted, yet the proviso attached to each of the estates created by the will, as they should successively vest in possession. *Doe d. Lumley v. Earl of Scarborough*. 724

4. The effect of this proviso, in the event of the title descending on a tenant for life, is not to let in the son of such tenant, but to carry the estate over to the next branch of the family. *Ibid.*
5. The will in which the above proviso was inserted, contained a devise to *A.* for life, remainder to trustees during his life to preserve contingent remainders, remainder to *F.* the son of *A.* in tail, remainders over. *A.* and *F.* suffered a recovery. The title of Earl of *S.* descends upon *A.*: Held, that the uses to arise under this proviso are not barred by this recovery. *Ibid.*
6. *Seemle*, that the remainders over

subsequent to the estate-tail limited to *F.*, are barred. *Ibid.*

### DILAPIDATIONS.

*What shall amount to.*

Under an inclosure act, lands are fenced in and allotted to the vicar and his successors, in lieu of tithes. The vicar dies, leaving the fences out of repair: Held, that his executors are liable to be sued by the succeeding vicar, for dilapidations. *Bird v. Relph.* 878

### DISCONTINUANCE.

*In Pleading.*

The statute of 32 H. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to Courts of Record. *Chitty v. Dendy*, (in error). 842

### DISHONOUR, NOTICE OF.

See **BILLS AND NOTES, IV.—EVIDENCE, 21.**

### DISTRESS.

I. *For Assessed Taxes, when authorized, and by whom to be made.*

See **ASSESSED TAXES, 1, 2, 3.**

II. *Right to distrain, when suspended.*

1. A promissory note given by the tenant to his landlord for rent, does not of itself suspend the right of distress until the note is due. *Davis v. Gyde.* 462

2. *Quære*, whether to an avowry for rent, an agreement to take a promissory note as accord and satisfaction could be pleaded in bar? *Ibid.*

3. Or an agreement to suspend the right of distress until a note, taken for the rent, should become due? *Ibid.*

III. *Privilege from Distress.*

And see **ADVERSE POSSESSION—ESTOPPEL, 1.**

4. All goods sent to a tradesman for

the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress. *Brown v. Shevil.* 277

5. As the carcase of a beast in the custody of a butcher, sent to him for the purpose of being slaughtered for the sender. *Ibid.*

6. So, although the sender be also a butcher. *Ibid.*

### DRUNKENNESS.

See **PARISH CLERK.**

### EASEMENT.

See **ANCIENT LIGHTS.**

### EJECTMENT, ACTION OF.

I. *Operation of Rule of H. T. 1834, upon.*

See **PRACTICE, 17, 18.**

### II. *Demand of Possession.*

1. *A.*, lessor at will,—*B.*, lessee at will,—*C.*, under-lessee at will. A demand of the possession made upon the premises, from the wife of *C.*, is sufficient to entitle *A.* to maintain ejectment. *Roe d. Blair v. Street and Fairbank.* 42

2. Whether a demand made off the premises, from the wife of *C.*, would be sufficient, *quære.* *Ibid.*

3. A party who defends in ejectment, as landlord as to Whiteacre, and as tenant for Blackacre, cannot take advantage of a defect in the service of a demand of possession made upon the tenant of Blackacre, for the purpose of determining an estate at will. *Ibid.*

### III. *Service of Declaration.*

See **PRACTICE, 16.**

### IV. *Who may defend.*

And see **ADVERSE POSSESSION—ESTOPPEL, 1.**

4. A person who obtains possession by fraud, cannot dispute the title of

those from whom he obtained such possession, until he has restored the possession so obtained. *Doe d. Johnson v. Baytrup.* 837

5. Where a verdict has been obtained in ejectment against *A.* and *B.*, who defended for different parts of the premises in the declaration, the Court, after setting aside the verdict as to *A.*, refused to amend the *postea*, by confining the verdict as against *B.*, to those premises for which *B.* specifically defended. *Roe d. Blair v. Street and Fairbank.* 43

### ELECTIONS.

See BRIBERY.—HABEAS CORPUS.

### ENGRAVINGS.

See COPYRIGHT.

### ENTRY, RIGHT OF.

- I. *Where to be implied from other Powers of Deed.*

See DEED, 2.

- II. *Where barred.*

See ADVERSE POSSESSION.

### ERROR.

*Allowance of Interest on Sum recovered, where Error brought.*

The Court of Exchequer Chamber cannot, under 4 *Will.* 4, c. 42, s. 30, allow interest upon the damages recovered in a personal action in which error is brought, except when the writ of error is tested subsequently to the day on which the act received the royal assent. *Burn and another v. Carvalho and others*, (in error). 893.

### ESCAPE.

*Action for, against the Sheriff.*

See EVIDENCE, 5, 6.

### ESTATE.

- I. *At Will.*

See EJECTMENT, 1, 2, 3.

- II. *For Years.*

See ADVERSE POSSESSION.—HUNDRED, 1, 2.—SETTLEMENT, 3, 4, 5, 6.

- III. *For Life.*

See DEVISE.

- IV. *In Tail.*

See DEVISE.

- V. *In Fee.*

See DEVISE—STAMP, 5.

### ESTOPPEL.

And see EJECTMENT, 4.

- I. *By Acceptance of Possession.*

1. *A.* having, without title, entered upon land and built a cottage, afterwards accepts a lease (by indenture) from *B.*; *C.* claiming the land as his own, pays to *A.* 20*l.* to give up the possession to him. Held, (in ejectment on the demise of *B.* against *C.*) that *A.* has estopped himself from controverting the title of *B.*, and that *C.* is bound by the estoppel, as having come in *under*, and received the possession from *B.* *Doe d. Bullen v. Mills.* 25

- II. *By Admission on Record.*

2. Where a licence to use patent machines is granted by indenture, in which it is recited that the grantor has invented the machines, and has obtained letters-patent for the sole use of the invention, and inrolled the specification,—the parties (and privies) to the deed, are estopped from pleading, either that the invention is not a *new* invention, or that the grantor was not the first inventor, or that no specification was inrolled. *Bowman v. Taylor.* 264

3. At nisi prius the defendant is entitled to produce evidence in support of a plea upon which issue is taken, though such plea be bad, as being repugnant to the admission of the parties on record. *Bowman v. Rostrow*. 552
4. As where, in a declaration in Covenant, certain recitals in the deed are set out, and the defendant pleads in denial of the facts contained in such recitals, and issue is taken on such denial. *Ibid*.

### III. By Recital in Deed.

5. Where the truth appears by recitals in a deed of conveyance, the party conveying is not barred by estoppel, although he has received the purchase money. *Doe d. Lumley v. Earl of Scarborough*. 724

## EVIDENCE.

*And see* PLEADING, CIVIL AND CRIMINAL, (*passim*).—REFLEVIN.

### I. Primary or Secondary.

1. In ejectment by the heir of *A.*, the defendant sets up a will of *A.* whereby he devises all his property in fee to *B.*, through whom the defendant claims. One of the attesting witnesses stated that he had prepared this will; that a fortnight afterwards he prepared another will for *A.*, which *A.* executed and delivered to him, and which the witness upon *A.*'s death delivered to *B.* No notice to produce the last-mentioned instrument had been given:—Held, that the plaintiff's counsel could not ask the witness, whether at the time of executing the instrument *A.* declared it to be his last will; and if so, whether it was attested by three witnesses. *Doe v. Morris*. 598
2. *Quære*, whether, if the second instrument could have been shewn to have been duly executed, published, and attested as the

last will of *A.*, the plaintiff would have been entitled to recover as heir, without shewing its contents or application. *Ibid*.

3. *Semble*, that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, unless such party has had notice to produce it. *Ibid*.
4. Upon a question, whether a pauper was settled in *A.* by the apprenticeship of her deceased husband, it was proved that indentures of apprenticeship, which were not produced, had been executed by the husband, his father, and master. In order to prove the loss of the indentures so as to let in parol evidence of the contents, the pauper was called to prove a conversation with her husband shortly before his death, respecting the indentures: Held, that such evidence was not admissible, it not having been proved that the indentures had ever been in the husband's possession, nor that inquiries had been made from the other parties to the indentures. *Rex v. Inhabitants of Rawden*. 97

### II. Records.

5. A return of *cepi corpus et paratum habeo*, together with a statement at the sheriff's office that there was no bail-bond, is evidence of an escape. *Neck v. Humphrey and another, Sheriff of Middlesex*. 707
6. Judgment by default upon an indictment for non-repair of a highway, is not *conclusive* evidence against the parish, of a liability on their part to repair such highway, *semble*. *Rex v. Inhabitants of Whitney*. 595

### III. Public Writings.

7. Upon an information against a sheriff, for refusing to execute prisoners upon whom sentence of death has been passed by justices of gaol delivery sitting in his



county, evidence was received for the crown of an order of the court of gaol delivery requiring a former sheriff to hang a criminal in chains, and an examined copy of the cravings of that sheriff filed in the Exchequer, wherein he craves to be allowed his expenses of gibbeting such criminal; which expenses were allowed by the then Chancellor of the Exchequer. *Rez v. Antrobus.*

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8. In all actions, by assignees of a bankrupt, which the bankrupt himself might have maintained if no bankruptcy had occurred, the depositions taken before the commissioners are conclusive evidence of the trading, &c.; although at the time of the bankruptcy the cause of action may not have been complete. *Kitchener v. Power.*

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9. And the question, whether the action is of such a nature, must be decided by a reference to the *facts* of the case, (which the judge may collect from the opening of the plaintiff's counsel), and not by a strict reference to the cause of action appearing *on the record.*

*Ibid.*

10. Therefore, where, in trover by assignees, the conversion was laid after the bankruptcy, it was held, that the plaintiffs were not precluded, by the form of the record, from having the depositions admitted as conclusive evidence.

*Ibid.*

#### IV. *Private Writings.*

11. Entries in a rent book made by the steward of a former owner *through* whom both parties claim, are admissible in evidence, though the party against whom they are produced does not claim *under* such owner. *Doe d. Strode v. Seaton.*

81

12. *A.*, an attorney, is employed by the vendor and vendee to draw

the conveyance, but another attorney *peruses the draft* for the vendee:—Held, that *A.* could not produce the draft of the conveyance, contrary to the wishes of a party claiming under the vendee.

*Ibid.*

13. Opinion of barrister, upon case submitted by both parties.

See ARBITRAMENT, 3, 4.

V. *Vivâ voce Evidence, where not receivable.*

14. The master, upon a reference to him of certain matters connected with a cause, cannot receive *vivâ voce* evidence, unless specially authorized so to do by the rule of reference or a judge's order, which order may be made pending the reference. *Noy v. Reynolds.* 483

15. And where upon such reference, the *vivâ voce* evidence of a party who refused to depose by affidavit was tendered, and was rejected by the master, the Court refused, after the master had made his report, to refer the matter back to him, upon the ground of the party's being then willing to make the affidavits which he had before refused to make.

*Ibid.*

#### VI. *Parol Evidence.*

16. Parol evidence admissible to correct misdescription of property in conveyance. See SETTLEMENT.

17. In an action for a breach of a covenant, in a lease of coal mines, to get the whole of the veins of coal lying under certain closes, "not deeper than or below the level of the bottom of the mine" at a certain point, evidence is receivable to shew that by the miners in the neighbourhood, the word "level" is used in a certain peculiar sense. *Clayton v. Gregson.*

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18. To prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of

- a house at 12*l.* per annum. The witness stated, that he let the house as agent to his father, who was present, and that the terms were reduced to writing to prevent mistake, and signed by the pauper, on purpose to bind her husband, the husband not being present; but that the entry was not signed by the witness or his father, nor did their name appear in any part. He further stated, *that he had no memory of these things but from the book, without which he should not of his own knowledge be able to speak to the fact; but on reading the entry, he had no doubt that the fact really happened:*—Held, that the entry was neither a lease nor an agreement for a lease within the Stamp Act. Held also, that the witness might look at the entry to refresh his memory, and that the evidence which he gave was parol evidence of a letting. *Rex v. The Inhabitants of St. Martin, Leicester.* 202
19. *Semble*, that a receipt "for a quarter's rent due from *A.*" (the occupier), is of itself evidence from which a letting to *A.* may be inferred. *Ibid.*
20. An agreement for the hiring of a servant may be proved by parol, although the terms of the agreement are by the direction of the parties written down by a third person, such writing, though read over to the parties, not being signed by them. *Rex v. The Inhabitants of Wrangle.* 375
21. In an action on a bill of exchange, by indorsee against drawer, evidence was given of a conversation between the defendant and *J. S.*, in which the defendant had said, in allusion to the action, that he had several defences,—that the plaintiff had not sent the letter to him in time. This having been left to the jury, after objection, as evidence of *due* notice of dishonour, and the jury having found a verdict for the plaintiff, it was held by *Littledale J.*, *Patteson, J.*, and *Coleridge, J.*, (*Lord Denman, C. J. dissent.*), that the jury were not warranted in presuming that the plaintiff had given *due* notice. *Braithwaite v. Coleman.* 654
22. Where, upon a question as to the validity of a marriage between *A.* and *C.*, it appears that *A.*'s first wife, *B.*, was alive in a distant colony twenty-six days before the second marriage, the sessions or a jury are justified in finding the second marriage to be void. *Rex v. Inhabitants of Harborne.* 341
23. Neither the sessions nor a jury trying an issue as to the validity of such marriage, are bound to presume the death of *B.* in favour of the innocence of *A.* in contracting a second marriage, but may look to the evidence in each particular case. *Ibid.*
24. Evidence of reputation is not admissible upon a question, whether, by custom, the sheriff of a county or of a city is bound to do execution upon criminals condemned to death by a judge of gaol delivery, at the assizes for the county. *Rex v. Antrobus.* 565
25. Whether, upon a question as to the liability of the mayor and citizens of an incorporated city, to perform a certain public duty, declarations of deceased citizens, in favour of the existence of such liability, are admissible in evidence, *quære.* *Ibid.*
26. What sufficient evidence to connect a challenge with a party against whom criminal information prayed. See CRIMINAL INFORMATION.
- VII. *Upon particular Issues.*
27. What sufficient to support plea of the statute of limitations.
- See LIMITATIONS, STATUTES OF, II. IV.

VIII. *Declarations, suprà, 25.*

IX. *Presumption of Continuance of Life, suprà, 22, 23.*

X. *Reputation, suprà, 24.*

EVICTIO, PLEA OF.

*See PLEADING, IV.*

EXCEPTION.

*See POWER.*

EXCEPTIVE HIRING.

*What shall be.*

*See SETTLEMENT, 10.*

EXCHEQUER CHAMBER.

*See ERROR.*

EXECUTION.

*In Actions in inferior Courts.*

*See PRACTICE, IX.*

EXECUTION OF CRIMINALS.

*By whom to be performed.*

*See FELONY, 1.—SHERIFF.*

EXECUTION OF POWER.

*See POWER.*

EXECUTORS.

I. *Where liable to Costs of Suit as of course. See COSTS, 2.*

II. *Where liable at the Discretion of the Court, by 3 & 4 Will. 4, c. 42, s. 31. See COSTS, 3.*

FEE SIMPLE.

*By what words devised.*

*See DEVISE, 1.*

FELONY.

1. The Court of King's Bench has

authority to order the sheriff of any county, or the marshal of the Court, to carry into execution a sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol delivery. *Rex v. Garside and Mosely.* 33

2. A proclamation promising a pardon cannot be pleaded as a pardon.

*Ibid.*

3. But where such proclamation had been made, the Court, in their discretion, deferred the awarding of execution upon the sentence, until the prisoner should have had time to apply to the Secretary of State for a pardon, according to the terms of the proclamation. *Ibid.*

4. The Attorney-General, upon motion, is entitled, as of course, to a habeas corpus and certiorari to bring up a prisoner, and the record of his conviction, in a case of felony.

*Ibid.*

5. In a case of conviction for murder, in which the prisoners were brought up by habeas corpus, and the record by certiorari, the Court gave the prisoners three days time to examine the record and instruct counsel to show cause why execution should not be awarded against them.

*Ibid.*

6. *Semble*, that a pardon after judgment, may be pleaded *ore tenus*, and in bar of execution; and that there may be a demurrer to such a plea *ore tenus.*

*Ibid.*

FEOFFMENT.

*Stamp on Deed of.*

*See STAMP, 5.*

FINE.

*Partes finis nihil habuerunt.*

A fine could be levied only by a person having the *freehold*, either by right or by wrong. *Doe d. Parker v. Gregory.* 308

### FIXTURES.

*And see* TROVER, 3.

1. Under bequests of *fixtures* and *fixed furniture* to *A.*, and of household goods, furniture, plate, &c. to *B.*, *A.* is entitled to chimney-glasses and book-cases fastened by screws and brackets to the walls of the house, as *fixed furniture*. *Birch, Administrator, &c. v. Dawson.* 22
2. Under a bequest of a leasehold house, "with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture therein," chimney-glasses and book-cases fastened to the wall by means of brackets and screws, do not pass. *Ibid.*

### FRAUD.

I. *Not to be inferred.*

1. Where fraud is not expressly found by the sessions, in a special case sent by them, this Court cannot *infer* it from any state of facts. *Rex v. The Inhabitants of Llan-fihangel-Aberconin.* 355
2. But in a case where the facts stated were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the Court sent back the case to be re-stated. *Ibid.*

II. *Not to avail the Party.*

*And see* ADVERSE POSSESSION, 1.

3. A person who obtains possession by fraud cannot dispute the title of those from whom he obtained possession, until he has restored the possession so obtained. *Doe d. Johnson v. Baytrup.* 837

### FRAUDS, STATUTE OF.

*And see* ASSUMPSIT—GUARANTEE—INCORPOREAL HEREDITAMENT—PLEADING, 26, 27.

*Contract for Sale of Lands.*

1. Upon a sale of land by auction, a

written contract is signed by the purchaser, whose signature is attested by the auctioneer's clerk thus:—"Witness *J. N.*" The clerk also signs a receipt for the deposit and the moiety of duty, and afterwards pays over the deposit to the vendor, whose attorney subsequently writes to the attorney for the purchaser, that he cannot make out a marketable title, and that he advises the purchaser to relinquish his purchase. Held, that the vendor was not bound by the contract. *Gosbell v. Archer.* 485

2. Whether a signature by *J. N.*, who is authorized to sign a contract as agent for one of the parties to a sale of land, thus:—"Witness *J. N.*" will be sufficient to bind the principal, where there is no other signature to which these words can be referred as attesting such signature, *quære.* *Ibid.*

### FRAUDULENT REMOVAL.

*Of pregnant unmarried Woman by putative Father.*

*See* BASTARDY, 1, 2.

### GENERAL INTENT.

*See* WILL, 2.

### GROSS NEGLIGENCE.

I. *What shall constitute.*

*See* BAILMENT, 1, 2.

II. *What Evidence of.*

*See* BAILMENT, 3.

### GUARANTEE.

I. *Pleading in Action upon.*

*See* PLEADING, 26, 27.

II. *When barred by Statute of Limitations.*

*See* LIMITATIONS, STATUTES OF, 6, 7.

III. *Construction of.* *Ibid.*

**HABEAS CORPUS.**

*Where granted.*

The Court will not grant a habeas corpus, for the purpose of enabling a party, in the custody of the sheriff, to go to the county of which he is a freeholder and vote at a general election. *Ex parte Jones.* 340

**HIGH CONSTABLE.**

The Court will not grant a mandamus, requiring the justices at sessions to direct the putting in suit of a bond given by a high constable for the due performance of his office;—for the purpose of procuring reimbursement to a parish, upon which the high constable has, in disobedience of an order of sessions, levied excessive rates. *Ex parte The Inhabitants of Carlton High Dale.* 312

**HIGHWAY.**

**I. Liability of Parish to repair.**

See EVIDENCE, 6.

**II. Appeal against Order for stopping.**

1. A notice of appeal against an order for stopping up a highway is sufficient, if it state that the appellants are aggrieved by being compelled to go a greater distance to the next market-town from their respective residences, than they would have gone if the road intended to be stopped up were put and kept in a proper state of repair. *Rex v. Adey and others.* 365
2. It need not expressly state that they were aggrieved *by the order.* *Ibid.*

**HORSE.**

See WARRANTY OF SOUNDNESS.

**HUNDRED, ACTION AGAINST.**

1. If an action be brought by a ter-

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mor, upon 7 & 8 Geo. 4, c. 31, for an injury done to his house, within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot bring a fresh action. *Till-Adam v. Inhabitants of Bristol.* 144

2. Whether an executor of a termor can in *any* case bring an action upon 7 & 8 Geo. 4, c. 31, for an injury sustained in the lifetime of his testator, *quære.* *Ibid.*

**HUSBAND AND WIFE.**

And see AGENT—MARRIAGE.

*Indorsement by Husband, of Promissory Note payable to order of Wife.*

See BILLS AND NOTES, 1.

**INCORPOREAL HEREDITAMENT.**

*How conveyed.*

A demise in writing, but not under seal, of a messuage, and full, free, and exclusive licence and leave for the lessee, his friends, gamekeepers, &c., to hunt, hawk, course, shoot, and sport in, over, and upon a manor of the lessor, and to fish in the ponds and waters thereof, from August to February following, at an entire rent, is altogether void. *Bird v. Higginson.* 505

**INDEMNITY.**

And see JUSTICES, 5.

1. The rule that a tort-feasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an *obviously* illegal character. *Betts and Drewe v. Gibbins.* 64
2. It does not extend to a case in which there is any *bonâ fide doubt*

whatever, whether, in point of law, the act was authorized. *Ibid.*

3. The rule as to contribution between joint tort-feasors must be similarly confined. *Ibid.*

4. Contribution is indemnity, and the same consideration that will support a promise to indemnify, will also support a promise to contribute, *et e converso*. *Ibid.*

5. In cases where an express promise will be supported, an implied promise arising out of the circumstances of the case will also be available. *Ibid.*

### INDICTMENT.

*And see* PLEADING, (Criminal.)

*Certificate of, on what Terms obtainable from Crown Office.*

*See* PRACTICE, (Criminal.)

### INFERIOR COURT.

*Pleading two Pleas to Action in.*

*See* PLEADING, VIII.

### INFORMALITY.

*See* ORDER OF SESSIONS.

### INNKEEPER.

*See* SETTLEMENT, 12.

### INNOCENCE.

*Presumption in favour of.*

*See* EVIDENCE, 23.

### INNUENDO.

*Where doubtful Words may be explained by.*

*See* DEFAMATION, 2.

### INSANE PERSON.

*See* WARRANT OF ATTORNEY.

### INSOLVENT DEBTOR.

*Remedy of Creditor under Lords' Act.*

To authorize a creditor to bring up an insolvent under the compulsory clauses in 33 Geo. 3, c. 5, the debt, inclusive of costs, for which the insolvent is charged in execution, must be under 300*l*. *Robins v. Cresswell.* 307

### INSURANCE.

#### I. When valid.

1. A policy of insurance on a ship lost or not lost, executed after the ship is known by all the parties to be lost, but in pursuance of an agreement to insure entered into before the loss, is valid. *Mead v. Davison.* 701

2. Where by the rules of an insurance association, insurances are to commence on the day on which the ship is accepted by the committee, and to continue in force for twelve months, a ship, accepted in February and lost in June, is well insured by a policy executed 3d October. *Ibid.*

3. And no objection to its admissibility in evidence arises upon the stamp act, 35 Geo. 3, c. 63. *Ibid.*

4. A letter of attorney was given to execute policies in conformity with the above rules: Held, that the execution of the above policy was thereby authorized. *Ibid.*

#### II. Consolidation of Actions.

5. A plaintiff cannot be required to consent that actions commenced by him against several underwriters upon the same policy, shall be consolidated upon the terms that the verdict in one action shall be binding in the other actions upon the plaintiff as well as upon the respective defendants. *Doyle v. Stewart, Doyle v. Anderson.* 873

## INTEREST OF MONEY.

*See* ERROR—LIMITATIONS, STATUTES OF, 8.

## INTEREST IN LAND.

*Where sufficient to confer a Settlement by Estate.*

*See* SETTLEMENT, II.

## INTERPLEADER ACT.

*Appearance upon Sheriff's Rule, how to be made.*

Held, that where a sheriff obtains a rule under the Interpleader Act, calling upon an execution creditor and a third party who claims goods seized by the sheriff under a *fi. fa.*, to appear and state the nature of their claims, such third party will be barred unless he appear and state by affidavit the nature of his claim. *Poweler v. Lock.* 852

## JOURNEYS ACCOMPTS, 157

## JUDGE AT CHAMBERS.

*Power to award Costs.*

*See* COSTS, 18.

## JUDGMENT.

## I. On Warrant of Attorney.

*What sufficient to induce Court to grant Rule for.*

*See* PRACTICE, 9, 10, 11.

*When Court will set aside Warrant of Attorney.*

*See* PRACTICE, 12, 13.

## II. By Default.

*On Indictment for Non-repair of Highway, Effect of.*

*See* EVIDENCE, 6.

## JURY.

*Course to be pursued when Jury cannot agree.*

*See* PRACTICE, III.

## JUSTICES.

*And see* BASTARDY, 1.—HIGH CONSTABLE.—LUNATIC.—ORDER OF SESSIONS.—POOR-RATE.—VESTRY.

## I. Jurisdiction of.

1. In a borough in which, by charter, the borough justices have exclusive jurisdiction in misdemeanors, without jurisdiction in felonies, and the county justices are *not to intrmit* themselves, and in which a borough rate applicable to the purposes of a county rate, was levied before the passing of 55 Geo. 3, c. 51, the county justices have no power to order the levying of a county rate, although, by virtue of its charter, the borough brings burthens upon the county. *Rex v. Shepherd.* 185

2. By a local act it is provided, that if any person shall find himself aggrieved by any rate made under the authority of that act, he shall first *apply to two justices*, and if *not relieved*, he shall be obliged to pay such rate, and appeal to the quarter sessions: Held, that a power in the two justices to *relieve*, upon application made to them, is necessarily implied. *Rex v. Rector, &c. of St. James's, Westminster.* 252

## II. Liability of.

3. This Court will not issue a mandamus to compel magistrates to issue a distress warrant to enforce the payment of poor rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding. *Rex v. Hall and Dyer, esqrs.* 546

4. The Court refused to award a mandamus, commanding justices to enforce, by issuing a warrant of distress, a highway rate assessed upon land which had never been rated before, and the liability of which to be rated was denied.

*Rex v. The Justices of Somersetshire.* 394

5. And the prosecutor having, previously to the motion for a rule for a mandamus, merely proposed to call a meeting for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with costs.

*Ibid.*

6. The Court will not grant a rule nisi for a criminal information against magistrates, unless it appears they have acted from an *oppressive, dishonest, or corrupt* motive, under which *fear and favour* are included. *In the matter of Fentiman.* 126

### III. Notice of Application against.

7. A magistrate is entitled, in all cases, to six days' notice of an intention to apply for a rule nisi for a criminal information against him, and it is not sufficient that in point of fact six days have expired between the notice and the motion, if the notice contemplates an earlier application.

*Ibid.*

8. Where a certain number of days' notice of an intention to do an act is required, the day of the service of the notice is *excluded* from the computation, and that on which the act is to be done is included, unless there be some special provision requiring a different mode of computation. *Rex v. Justices of Cumberland.* 378

9. Therefore, notice to magistrates of an intention to apply, on the 25th day of the month, for a certiorari to remove an order made by them for the allowance of accounts of surveyors of highways, served upon the 20th of the same month, is not a sufficient notice within 13 *Geo. 2*, c. 18, s. 5, requiring six days' notice to be given.

*Ibid.*

## LAND TAX.

*When Payment of, by Landlord or his Steward, will support an Action for Money paid against the Tenant.*

See MONEY PAID.

## LANDLORD AND TENANT.

See DISTRESS, II.—EJECTMENT, 1, 2, 3, 4.—EVIDENCE, 18, 19—ESTOPPEL, 1.

## LATENT AMBIGUITY.

*Parol Evidence to explain.*

See EVIDENCE, 17.

## LEASE.

*Estoppel from denying Lessor's Title by Acceptance of.*

See ESTOPPEL, 1.

## LIBEL.

See COSTS, 17.

## LIBERUM TENEMENTUM.

*Operation of Plea of.*

See PLEADING, 9.

## LICENCE.

See ESTOPPEL, 2.

And see ADVERSE POSSESSION, 1.

## LIEN.

*Of Attorney on Will of deceased Client.*

See PROHIBITION.

## LIFE.

*Presumption of Continuance of.*

See EVIDENCE, 22, 23.

## LIMITATIONS, STATUTES OF.

### I. Entry or Ejectment.

1. *A. devises to B. his wife in fee. B. in 1772 enters and marries C. After a few years B. and C. quit*



the possession and remove to another county. *B.* and *C.* die in 1828 and 1832, without having levied any fine, leaving a son *D.*: Held, that an ejectment brought by *D.* in 1835, is barred by 3 & 4 *Will.* 4, c. 27, s. 17. *Doe v. Branson.* 664

And see ADVERSE POSSESSION.

## II. Action on the Case.

2. Where in trover by bailor against bailee, the defendant pleads the statute of limitations, it is not sufficient for the defendant to prove acts done more than six years before action brought, which the bailor might at his option have treated as acts of conversion; but he must prove clear unequivocal acts of adverse ownership. *Philpott v. Kelly.* 611
3. Where, in trover for wine and bottles, the plaintiff shews that more than six years before action brought he deposited a pipe of wine and some bottles with the defendant, it is not sufficient for the defendant, in supporting a plea of the statute of limitations, to shew the mere fact of the wine having been bottled more than six years before action brought, and whilst it continued in his cellar. *Ibid.*
4. Nor though that fact be followed by consumption of a part of the wine, within six years before action brought. *Ibid.*
5. Nor is it a sufficient answer to the whole demand, to shew that a part of the wine was consumed more than six years before action brought. Per *Patteson, J.* and *Coleridge, J.* *Ibid.*
6. A letter written to a bailee by the bailor's attorney within six years before action brought, in which he says, that the bailor has instructed him to commence the necessary proceedings for the recovery of the goods which were deposited

with the bailee, and demanded as long ago as on a day named, (more than six years before action brought), and threatening to commence proceedings if the goods are not delivered within a week—is evidence of a demand and refusal more than six years before action brought, proper to be submitted to the jury under a plea of the statute of limitations in trover for the goods; *semble.* *Ibid.*

## III. When Time begins to run.

7. *A.*, in consideration of *B.*'s supplying *C.* with goods, guarantees to *B.* the payment of the price. *B.* having supplied *C.* with goods, and *C.* having neglected to pay the price, *A.*, in consideration of *B.*'s extending to *C.* a period of two years and upwards for the liquidation of his debt, agrees to reserve to *B.* all right and claim which *B.* may now have against him, *A.*, by virtue of the security previously entered into on *C.*'s behalf, and to be bound by it, if, at the expiration of such period, *B.*'s demand shall not have been fully discharged. Held, that *A.*'s liability attached upon default made by *C.* after the expiration of two years and a few days; that *B.*'s right of action then accrued; and that therefore the statute of limitations then began to run. *Holl v. Hadley.* 515
8. *A.* guarantees to *B.* the debt of *C.*, upon condition, "that no application shall be made to *A.*, on *B.*'s part, for the amount guaranteed, or any portion thereof, but on the failure of *B.*'s utmost efforts and legal proceedings to obtain the same from *C.*" *C.* remains in England two years, and then goes abroad insolvent, not having paid the debt to *B.* No proceedings are taken against him until four years after the guarantee given, when process is issued and continued on

the roll; *C.* remaining abroad until more than six years after the guarantee given; the guarantee is discharged by the laches of *B.* *Ibid.*

IV. *What shall take the Case out of the Statute.*

9. In order to take a case out of the Statute of Limitations, a payment of 12*s.* as interest money was proved. This does not justify a verdict finding a debt of 13*l.* 16*s.* *Leeson v. Smith.* 304
10. A verdict for nominal damages only could upon this evidence have been sustained, *semble. Ibid.*
11. In a letter written to the plaintiff within six years, the defendant says, "I can never be happy until I have not only paid you every thing, but all to whom I owe money,"—and—"Your account is quite correct; and Oh! that I were now going to inclose you the amount of it." Held, that this was evidence to go to the jury, of an acknowledgment taking the case out of the Statute of Limitations. *Dodson v. Mackey.* 327
12. Held, that such promise, accompanied by this expression, "It is impossible to state to you what will be done in my affairs at present. It is difficult to know what will be best, but immediately it is settled, you shall be informed;" is an absolute unconditional promise, and not a qualified or conditional promise. *Ibid.*
13. Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted by the latter, would entitle the plaintiff to recover more than nominal damages, *quære. Ibid.*

LONDON, CITY OF.

*See* CUSTOM.

LORDS' ACT.

*See* INSOLVENT DEBTOR.

LOSS OF INSTRUMENT.

I. *When Evidence of may be gone into.*

II. *When presumable.*

*See* EVIDENCE, 3, 4.

LUNATIC.

*And see* WARRANT OF ATTORNEY.

I. *Jurisdiction of Justices in respect of Pauper Lunatics.*

1. The 9 Geo. 4, c. 40, s. 38, does not authorize a retrospective order for the maintenance of a lunatic. *Rex v. Inhabitants of St. Nicholas, Leicester.* 624
2. An order under that act, stating that the party (who was not settled in the parish in which he was found) was *so far disordered in his senses, that it was dangerous for him to be permitted to go abroad*, and that the justices *have* adjudged that his settlement is in a particular parish, was held sufficient, although the *form* given in the schedule to the act was not pursued, and the order contained no words of *present adjudication. Ibid.*

LUNATIC ASYLUM.

*See* COVENANT.

MAGISTRATES.

*See* JUSTICES.—SESSIONS.

MALICIOUS PROSECUTION.

*Pleas, under the New Rules, in bar of Action for.*

*See* PLEADING, 28, 29.

MANDAMUS.

*And see* JUSTICES, II.—PRIVY COUNCIL.

Before a mandamus will be issued to

an incorporated company, requiring them to perform a duty, it is necessary that the applicant should shew either a refusal in direct terms, or circumstances from which a refusal can be *conclusively* implied. *Rex v. Brecknock and Abergavenny Navigation Company*, 871

### MANOR.

See SETTLEMENT, 19.

### MARKET OVERT.

See TROVER, 1.

### MARLBOROUGH, BOROUGH OF.

See JUSTICES, 1.

### MARRIAGE.

And see SETTLEMENT, 4, 5, 6.

*Invalidity of, from Presumption of Life of former Wife.*

See EVIDENCE, 22, 23.

### MASTER AND SERVANT.

I. *When yearly Servant, dismissed by Master, may recover Wages for the entire current Year, or pro ratâ.*

1. A yearly servant dismissed upon sufficient cause cannot recover wages either for the whole of the current year, or pro ratâ in respect of the portion of the current year during which the service continued, although the misconduct constituting the sufficient cause of dismissal was not the *motive* from which the dismissal proceeded. *Ridgway v. Hungerford Market Company*.

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2. After a general hiring at a yearly salary, payment and acceptance of the salary by quarterly payments is evidence of a subsequent contract to pay and receive quarterly.

*Ibid.*

II. *In what Form of Action to be recovered.*

3. Whether a yearly servant, wrongfully dismissed during a current year, can maintain Debt or Indebitatus Assumpsit for his wages, either for the entire year or pro ratâ, or whether his remedy is by action for the wrongful disturbance, *quære.* *Ibid.*

### MASTER OF THE KING'S BENCH.

I. *In what Form he may receive Evidence, upon Reference of Matters connected with a Cause.*

See EVIDENCE, 14.

II. *When Matter will be referred back to Master.*

See EVIDENCE, 15.

III. *Authority of, upon Questions of Costs.*

See COSTS, 14, 15.

### MEMORANDUM OF AGREE- MENT.

*When liable to Stamp.*

See STAMP, 1.

### MEMORIAL OF ANNUITY DEED.

I. *What a fatal Inaccuracy in.*

See ANNUITY, 1.

II. *How Inaccuracy may be shewn to Court.*

See ANNUITY, 2.

### MIDDLESEX COUNTY COURT ACT.

*What a good Plea under 23 Geo. 2, c. 33, s. 19.*

See PLEADING, 11.

## MINE.

- I. *What constitutes a Mine, so as to be non-rutable to Relief of the Poor.*

See POOR-RATE, 1.

- II. *Coal Mine, where rutable.*

See POOR-RATE, 4.

MISDESCRIPTION OF CLOSE  
IN PLEADING.

*How taken advantage of.*

See PLEADING, II.

## MONEY HAD AND RECEIVED.

*Action for, upon Failure of Consideration.*

See ASSUMPSIT, 1.

## MONEY PAID.

By a local act, the landlord or the receiver of the rents, and not the tenant, is rendered liable to pay the poor-rates. By a written agreement, *A.*, the tenant, agreed with *B.*, the landlord, to pay the rent, clear of all rates and taxes. After occupying the premises for some time, *A.* quitted them, leaving the land-tax and poor-rates unpaid. The receiver of the rents was compelled to pay the rates, and the succeeding tenant the land-tax, which rates and land-tax were repaid to them by *B.*: Held, that *B.*'s remedy was on the special agreement, and that he could not recover these sums from *A.* as money paid to *A.*'s use. *Spencer v. Parry*, 770

## MORTGAGE.

*When transfer Duty payable.*

See STAMP, V.

## NEGLIGENCE.

- I. *Of Attorney.* See NEW TRIAL, 2.

- II. *Of Bailee.* See BAILMENT, I.

## NEW TRIAL.

I. *Ground for granting.*

1. The Court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance, by his late attorney, of the state of the action; that he had a good defence upon the merits; and that the verdict passed against him by reason of the negligence of such late attorney. *Moody v. Dick*. 348
2. *Semble*, that the defendant's remedy is by action against the attorney, for negligence. *Ibid.*
3. Where a plaintiff had been nonsuited on the ground of the non-production of a bill of exchange, the Court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the Court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession. *Atkins and Short v. Owen*. 123
4. Where, upon shewing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the Court will make the rule absolute, unless the parties consent that the damages shall be reduced. *Leeson v. Smith*. 304

II. *Course of Practice in Cases before Under-sheriff.*

5. Upon a motion for a rule nisi for a new trial of a cause tried before an under-sheriff, the party making the application should produce a copy of the under-sheriff's notes, verified by affidavit; or an affidavit stating a refusal by the under-sheriff to give a copy of his notes, and bringing before the Court the facts proved at the trial. *Hall v. Middleton*. 368

### NEWSPAPER.

#### I. *Action for Penalties.*

1. The enactment in 44 G. 3, c. 98, s. 10, (prohibiting the bringing of actions for penalties "incurred by virtue of that or any other act relating to the stamp duties," unless prosecuted in the name of the attorney-general, or of the solicitor of stamps,) applies only to cases in which the *subject-matter of the action* relates to the stamp duties. *Smith v. Gillett.* 225
2. Therefore it does not apply to actions brought for penalties incurred by printing and publishing a newspaper, without complying with the regulations imposed by 38 Geo. 3, c. 78, ss. 2, 4, 7, and 10, although that act contains various provisions relating to the stamp duties. *Ibid.*

#### II. *Criminal Information for Libel.*

3. The Court will discharge a rule for a criminal information for a libel, against the publisher of a newspaper, where in the affidavits upon which the rule had been obtained, and the affidavit sworn at the stamp office, the defendant was described as of different places. *Rex v. Samuel Francis.* 251
4. So, although the rule had been twice enlarged, and the prosecutor apply to have the rule again enlarged, that he may have an opportunity of amending his affidavit. *Ibid.*

### NOMINAL DAMAGES.

See LIMITATIONS, STATUTES OF, 10, 13.

### NONSUIT.

And see NEW TRIAL, 4.

*When Judge may direct a Nonsuit.*

See PRACTICE, III.

### NOT GUILTY.

- I. *Effect of Plea of, under the New Rules, in an Action for Malicious Prosecution.*

See PLEADING.

- II. *In Case for diverting a Mill Stream.*

See PLEADING, 18, 19.

### NOTICE.

- I. *To Magistrates, of Intention to move Court against them.*

See JUSTICES, III.

#### II. *Of Dishonour of Bill.*

See BILLS AND NOTES, IV.—EVIDENCE, 22.

### NUNQUAM INDEBITATUS.

- Plea of, what may be given in evidence under.*

See PLEADING, 16.

### ORDER OF REMOVAL.

#### I. *How directed.*

1. An order of removal directed to the overseers of a parish, which has no overseers *quá* parish, is bad. *Rex v. The Inhabitants of Cartmel, Lancashire.* 357
2. Therefore, where a pauper had gained a settlement by hiring and service on waste ground within a parish, the remainder of which is divided into townships, having separate overseers, and supporting their own poor, and which parish, *quá* parish, has no overseers or poor-rate,—a removal to the parish at large is bad; although it is not shewn that the waste land belongs to any one of the townships of the parish, and although by an award made under the authority of an act of parliament for inclosing the commons, &c. in the parish, it is directed that the said waste lands shall contribute in certain propor-

tions to the rates (parochial or otherwise,) of *each* of the several townships with the parish. *Ibid.*

## II. *Effect of Suspension of.*

See SETTLEMENT, 14.

## III. *Effect of Execution of.*

See SETTLEMENT, 15.

## IV. *Costs of Appeal against, where grantable.*

See SESSIONS, III.

## ORDER OF SESSIONS.

### I. *Sufficiency of.*

1. An order of sessions quashing an order of removal "for *informality*," was confirmed by this Court, although the order of removal appeared upon the face of it free from defect. *Rex v. The Inhabitants of Cottingham.* 215
2. The Court will in such a case intend, that the sessions used the word "*informality*" as expressive merely that their decision had proceeded upon grounds distinct from the merits of the appeal. *Ibid.*
3. This Court will entertain no objection to an order of sessions which upon the face of it does not appear to be necessarily bad, unless the particular facts are brought before the Court by a special case. *Ibid.*

## OVERSEER.

And see POOR-RATE.—VESTRY, 2.

### I. *Appeal against Overseer's Accounts.*

1. A parishioner, rated only in one of three rates made during a particular year, but afterwards continuing to be a regular rated inhabitant, is entitled to appeal against the overseers' accounts for the whole of that year, and may object to the allowance of charges for the making and collecting of those rates in

which he was not himself assessed. *Rex v. Gwyer and Manley.* 158

2. An overseer cannot charge the parish with a sum *bonâ fide* paid by him to other persons for making out a poor-rate. *Ibid.*
3. Nor can he charge a sum so paid for making two divisions of the same. *Ibid.*
4. Nor a sum paid for making a copy for collectors. *Ibid.*
5. Nor a sum paid to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters. *Ibid.*
6. Nor a poundage paid to persons employed in collecting the rates. *Ibid.*
7. Although it be found by the sessions, that the charges are fair and reasonable, and that the overseers required assistance. *Ibid.*
8. Nor can a vestry, even though all the then rated inhabitants be present, authorize the overseer to charge the parish with such expenses. *Ibid.*

## PAPER BOOKS.

*Non-delivery of.*

See PRACTICE, 3.

## PARDON.

See FELONY, 2, 3, 6.

## PARISH.

See OVERSEER.—POOR-RATE.—VESTRY.

## PARISH CLERK.

### I. *Amotion of.*

1. Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, amoves him upon insufficient evidence of the intoxication, the Court will issue a mandamus to the vicar, requiring him to restore the clerk. *Rex v. Neale, clerk.* 868
2. *Quære*, whether it would be sufficient ground to amove a clerk,

that amongst his neighbours he was notorious as a drunkard,—without proof of particular acts of intoxication and indecorum. *Ibid.*

3. If one act of intoxication be relied on, the intoxication and consequent incapacity to perform the duties of his office when required to do so, should, at all events, be distinctly proved. *Ibid.*

#### PARSON.

*Liability for Dilapidations, &c.*

*See* DILAPIDATIONS.

#### PART PAYMENT OF DEBT.

*Appropriation of.*

*See* DEBTOR AND CREDITOR.

#### PARTNER.

1. *What shall amount to a Partnership.*

1. *A.*, at the suggestion of *B.*, by letter, orders a cargo of timber of *C.* The invoice is made out in the name of *A.*, and a bill of exchange is drawn by *B.* on *A.* for the amount of the freight, which is paid by *A.* In an action brought by *C.* against *A.* and *B.* for the price of the goods, it is competent to *C.* to shew that *A.* and *B.* were jointly interested in the purchase. *Russell and another v. Roberts and Dempsey.* 31

#### II. *Authority of Copartners.*

2. Whether one partner can bind his copartners, by a submission to arbitration of a question of legal liability of the partnership, *quære.* *Boyd v. Emmerson and others.* 99

#### PATENT.

*See* ESTOPPEL, 2.

#### PAYMENT.

*By giving credit.*

*See* BILLS AND NOTES, 5, 6.

#### PAYMENT OF MONEY INTO COURT.

*See* ARREST, 1.—TENDER, 2.

#### PENAL ACTION.

##### I. *Declaration.*

Where in a bye-law of a corporation, making certain regulations for breach of which parties are to be suable for a penalty, there is a separate proviso making certain exceptions, a party suing for breach of the bye-law need not aver in the declaration, that the case was not within the exception in the proviso; but such fact, if it exists, must be shewn by the defendant by way of excuse. *Shaw, Bart. v. Poynter.* 290

#### PHYSICIAN.

*Defamation of.*

*See* DEFAMATION, 3, 4, 5, 6.

#### PINDER.

*See* SETTLEMENT, 19.

#### PLEADING, CIVIL.

*And see* COSTS, 1, 2, 3, 9, 16, 17—*PRACTICE (passim)*—SET-OFF.

##### I. *Declaration.*

*And see* PENAL ACTION.

1. *A.* and *B.*, lessees of a coal mine, *A.* being also lessee in trust for himself and *B.* of land adjoining necessary for the working of the mine, covenant with *C.* that they will do nothing whereby an annuity—charged (with power of entry upon the mine, &c. and sale, in case the annuity should be in arrear;) upon the profits, which, after payment of the rent, taxes, &c., then charged thereon, might be made, under the leases of the mine and land, by the sale of the coal or otherwise,—may be impeached. In an action on the covenant, *C.* assigns as breaches—first, that *A.* surrendered the land,

and took a new lease to himself and *B.*, jointly, in trust for other persons; whereby the annuity became and was impeached, and the plaintiff lost his remedies to enforce it: secondly, that *A.* and *B.* accepted a new lease of the land at an increased rent, and in other respects, upon less advantageous terms, for the fraudulent purpose of obtaining from the lessor a demise of mines under the land, upon terms advantageous to *A.* and *B.*; whereby the annuity became and was impeached: thirdly, that *A.* and *B.* assigned (amongst other things) such neighbouring mine and the land to *D.*; whereby the annuity became and was impeached. Held, that the declaration was insufficient, for not shewing in what manner the acts complained of operated to impeach the annuity. *Pitt v. Williams and another.* 412

2. In an action on a covenant to do no act whereby an annuity charged upon the *profits* of a coal mine shall be impeached, it is no ground of demurrer, that the declaration does not allege that any profits have been made. *Ibid.*
3. *Quare*, whether such omission would disentitle the plaintiff to recover more than nominal damages. *Ibid.*
4. In an action to recover arrears of the annuity, such allegation in the declaration would be required. *Ibid.*

## II. Description of Closes.

5. In a declaration in trespass *quare clausum fregit*, the plaintiff's close is described by *abuttals*: plea, seisin in fee in the defendant, and issue thereon. The plaintiff is entitled to recover for a trespass done in a close in his lawful possession, answering to the description in the declaration, although the defendant also has a close answering to the same description. *Lempriere v. Humphrey.* 638

6. So, although the *abuttals* are stated

with such generality that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description. *Ibid.*

7. As where the locus in quo is described as abutting on the four cardinal points *towards* certain closes, and the plaintiff proves a trespass on a close of a triangular shape abutting *towards* such closes. *Ibid.*
8. Where in a declaration in trespass *quare clausum fregit*, the locus in quo is described as abutting *towards* certain closes, the defendant may demur specially, or may obtain a judge's order for a more certain description of the close. *Ibid.*
9. But such defect cannot be taken advantage of at the trial of an issue raised upon a plea of seisin in fee or *liberum tenementum*. *Ibid.*
10. Nor could the objection have been taken, though the defendant had pleaded in denial of the plaintiff's possession of the alleged close. *Semble.* *Ibid.*

## III. Plea that Debt under 40s.

11. Plea, in bar to an action of debt for 20*l.*, that the debt did not amount to 40*s.*, and that the defendant, before and at the commencement of the suit, resided and still resides in Middlesex, and from the time of the accruing of the debt was, and still is, liable to be summoned in the county court of Middlesex: Held, that this plea was bad, under the Middlesex County Court Act (23 *Geo.* 2, c. 33, s. 19,) for not negating that the freehold, or title to land, or an act of bankruptcy, principally came in question, *Sandall v. Bennett.* 89
12. *Semble*, that such a plea in bar, though containing such negative averments, would not be good under 23 *Geo.* 2, c. 33. *Ibid.*
13. *Semble* also, that, generally, a plea in bar that the debt is under 40*s.* and recoverable in a county court,



could not be pleaded under the statute of Gloucester (6 *Edw. 1*, c. 8.)  
*Ibid.*

IV. *Plea of Eviction.*

14. Whether in Covenant, by the patentee of an invention, brought to recover rent reserved in respect of a licence to use the invention, a plea merely alleging that the invention was not new, or that the plaintiff was not the first inventor, without shewing that the defendant had in consequence failed to have the exclusive enjoyment covenanted for, is a good plea by analogy to a plea of *eviction, quære*. *Bowman v. Taylor.* 264

V. *Form.*

15. Held, that the statement of actionem non and the prayer of judgment are dispensed with by the ninth of the pleading rules (H. T. 4 *W. 4*), in a plea which is pleaded to the whole of one of several counts. *Bird v. Higginson.* 505

VI. *What in Issue.*

16. In an action of debt for goods sold and delivered, the defendant pleaded *nunquam indebitatus*:—Held, that he could not give in evidence, under this plea, that the goods were sold on credit which had not expired. *Edmunds v. Harris: tamen quære.* 182
17. To trespass for an assault and false imprisonment, the defendant pleaded that he was in lawful possession of a house, and that the plaintiff was unlawfully therein and had been requested to depart, but had refused; whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him in the presence of a policeman, wherefore he caused him to be taken to a police office: replication *de injuriâ*. The defendant proved all the matters of the plea, except the assault by the plaintiff: Held, that upon these pleadings the plaintiff was

entitled to recover damages for the imprisonment. *Reece v. Taylor and another.* 469

18. Under the rules of H. 4 *W. 4*, “not guilty” pleaded to a declaration in *Case* for the wrongful diversion of water from the plaintiff’s mill, puts in issue the mere *fact* of the diversion, and not its *wrongful* character. *Frankum v. The Earl of Falmouth and others.* 330

19. Therefore where the *fact* of the diversion was proved, but the plaintiff failed to shew his right to the water, the Court ordered the verdict, which had been entered for the defendant on the issue of “not guilty,” to be set aside, and a verdict to be entered for the plaintiff,—but *without* damages. *Ibid.*

20. Where in a declaration in *case*, for diverting a stream, the plaintiff entitles himself to the water as owner of a mill, and it appears in evidence that he is entitled only as owner of land, the judge refused to amend the declaration by adapting it to the proof. *Ibid.*

21. And the Court refused to give judgment for the plaintiff, upon an indorsement of the facts on the *postea*, under 3 & 4 *Will. 4*, c. 42. *Ibid.*

22. Where to an action on a bill of exchange, the defendant pleads want of consideration, and the plaintiff replies that the defendant had consideration for his acceptance, which consideration he states specifically under a *scilicet*, and then concludes to the country; the plaintiff is not bound to prove consideration in the first instance. *Lom v. Burrows.* 366

VI. *Variance.*

23. An allegation in a plea, of an agreement that a workman should not be paid unless the work should be completed *within* fourteen days before Michaelmas-day, was held not to be supported by evidence

of an agreement that he should not be paid unless the works should be completed fourteen days before Michaelmas-day. *Thomas v. Lambert.* 592

## VII. In particular Actions.

### (a) Debt upon Contract.

24. To Debt for twenty years' rent at 80*l.* a-year, upon a lease, the defendant pleaded the statute of limitations; and further, as to 1420*l.* part of the demand, that 17½ years ago, the plaintiff by deed assigned his reversion, and that no part of the 1420*l.* had accrued before the assignment. Verdict for the plaintiff upon the first issue, and for the defendant upon the second: Held, that the defendant was entitled to the postea. *Paddon v. Bartlett and another.* 321

25. But the judgment of the Court was reversed in *Cam. Scacc. Vide post*, vol. v.

### (b) Debt for Penalties.

See BRIBERY—PENAL ACTION—USURY, 4.

### (c) Defamation.

See DEFAMATION, I. II.

### (d) Guarantee.

26. A declaration in assumpsit stated that A. owed the plaintiff 5*l.*, and plaintiff had a lien on the goods of A.; that defendant, in consideration that plaintiff would abandon such lien, promised to see him paid the said 5*l.* within three months: Averment, that the plaintiff abandoned his lien: Plea, that the promise was a special promise to answer for the debt and default of another, but that there was no agreement in writing stating the consideration; and that the promise was contained in a certain memorandum in the following form:—"I hereby agree to see

you paid, within three months from the date hereof, the amount of 5*l.* due to you on account of Mr. A." Signed, &c.: Held, on demurrer, that the plea was an answer to the declaration, without stating that there was no other consideration for the promise; for that *prima facie* the promise was within the statute of frauds, and that the agreement set out in the plea was insufficient for want of statement of consideration, and that evidence of consideration was inadmissible in cases within the statute. *Clancy v. Piggott.* 496

27. Where, to a declaration on a special promise to answer for the debt of a third person, it is pleaded that there was no memorandum in writing signed by the defendant or his agent, a replication alleging that there was such a memorandum, without setting it out, was held good on special demurrer. *Wakeman v. Sutton.* 114

### (e) Malicious Prosecution.

28. In an action for a malicious prosecution, the Court will not permit the defendant to plead that he had probable cause to indict, together with a plea of not guilty. *Cotton v. Brown.* 831

29. The plea of not guilty to an action for a malicious prosecution puts in issue (under the new rules of H. T. 1834,) the fact of prosecution and the want of probable cause. *Ibid.*

### (f) Replevin.

See DISTRESS, 2, 3—REPLEVIN.

### (g) Use and Occupation.

30. *Semble*, that where a count in assumpsit to recover a rent reserved by parol demise, by the plaintiff to the defendant, of an incorporeal hereditament, states that the defendant *actually occupied* under such demise, the plaintiff may recover for the use

and occupation, *Bird v. Higginson.* 505

31. But where a count upon a parol demise of a messuage and the right to hunt, &c. over a manor, stated merely that the defendant *entered and became and was possessed* of the messuage, right, liberties, and premises, so to him granted as aforesaid: Held, that the plaintiff could not recover for the use and occupation. *Ibid.*

#### VIII. In inferior Court.

32. To debt in an inferior court, not of record, the defendant pleaded the general issue, and also, by leave of the court, a plea of set-off:—Held, that the latter plea was surplusage, and need not be noticed by either the plaintiff or the court. *Chitty v. Dendy, (in error.)* 842
33. And therefore, where in such case the plaintiff joined issue upon the first plea, and had a verdict and judgment thereon, this Court, upon a writ of false judgment, affirmed the judgment. *Ibid.*
34. A Court of Error will take judicial notice that a county court cannot give leave to plead double. *Ibid.*
35. The rule that duplicity in pleading must be taken advantage of by special demurrer, does not apply to the case of two distinct pleas pleaded without leave. *Ibid.*
36. The statute of 32 H. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to Courts of Record. *Ibid.*

#### PLEADING, CRIMINAL.

##### Strictness required in Proof of Allegations in Indictment.

1. Where a count, in an indictment, stated that the defendant made an assault upon a person who was in lawful possession of goods under a levy for a specified sum of money, for arrears of assessed taxes, with intent unlawfully to force him out of possession; Lord Denman, C. J.

held that it was necessary to prove that the specific sum was due, although he thought that no sum need have been stated. *Rex v. Ford, and others.* 451

#### POLICY.

##### See INSURANCE—PUBLIC POLICY.

#### POOR-RATE.

##### And see JUSTICES, III.

##### 1. What Property ratable.

###### (a) What exempted as a mine.

1. The mode of working, without reference to the nature of the material extracted, forms the true criterion by which to ascertain what constitutes a *mine*, so as to be exempt from poor-rates. *The King v. Dunsford.* 349
2. But whether, according to that criterion, a particular excavation is a *mine or not*; is a question of pure fact to be decided by the sessions, and by them alone. *Ibid.*
3. Where the sessions confirmed a rate as for a *stone quarry*, subject to a case in which the property is called a quarry, but in which the mode by which the stone is obtained is stated, and the question submitted to the Court is, whether the excavation described is exempt from the payment of rates; the Court sent the case back to the sessions, for them to find as a direct fact, whether, upon the criterion afforded by the mode of operation, the excavation is or is not a *mine*. *Ibid.*

###### (b) Coal Mine, where ratable.

4. A coal mine, lying in several parishes, is ratable to the relief of the poor in each of those parishes, although the adit and the machinery are in one parish only. *Rex v. The Inhabitants of Foleshill.* 360

###### (c) Exemption under Local Act.

5. It is not necessary, in order to

create a statutory exemption from poor rates, that the act should in express terms exempt from such particular rates; but it is sufficient if, by fair construction of the words of the act, the exemption clearly appears. *Rex v. The Inhabitants of Barnby Dun.* 436

Therefore, where in a local act, (by which a company are empowered to make the river D. navigable, and to make new cuts through the adjoining lands) it is enacted that the company "shall not be taxed or assessed for the navigation or the profits thereof at any place except the towns of A. and B." where account books are directed to be kept; the Court held that an exemption from poor rates, in respect of lands taken for the purpose of the act elsewhere than in A. or B., was created; and this although no part of the navigation is within the town of A.

*Ibid.*

6. And by a subsequent local act, after reciting that it would be advantageous to abandon the existing navigation in certain parts, and to make new cuts in lieu thereof, and empowering the company to make certain new cuts and to receive additional tolls in consequence thereof, it was enacted, that the cuts should, when made, be considered and taken as part of the navigation of the river D.; and that all provisoes, directions, restrictions, penalties, and forfeitures, in the former acts, respecting the boatmen employed on the said river, the owners, commanders, &c. of boats, &c. or other persons employed thereon, or passing the locks of the said river, or making obstructions thereon, or in any other respect relating to or for the benefit or protection of the said navigation, and all other powers and authorities therein contained, should extend and be applicable to the

said cuts, &c. as fully in every respect as if the said cuts, &c. had originally been part of the river D. navigation, and had been inserted in the several acts:—Held, that the company were exempted from poor rates in respect of land not in A. or B. taken by them under the powers of this act, and used for cuts in lieu of part of the old navigation. *Ibid.*

7. The words "shall when made be considered and taken as part of the navigation of the river D.," are alone sufficient to extend to the new cuts the exemption from assessment which had previously existed in respect of the navigation generally. *Ibid.*

## II. Liability in respect of.

8. Where payment of by landlord or his steward will support an action for money paid against the tenant. See MONEY PAID.
9. Where by a local act for the government of a parish, collectors of the rents of houses, &c. within the parish, "the yearly assessment or valuation whereof respectively shall be less than 30l." are made liable to be rated, and compellable to pay the rates in respect of such houses, &c.; *Seemle*, that the liability of the collector extends only to cases in which the *real* and not the *assessed* value of the houses respectively, &c. is under 30l. *Re v. Hall and Dyer, Esquires.* 546

## III. Relief from.

10. Where, by a local act of parliament, power is given to two justices to relieve an applicant aggrieved by a poor-rate, they have power to relieve in an individual case, by reducing the amount in which the party was assessed, although the ground upon which they consider him entitled to relief is, that the whole rate is made according to an *erroneous principle*.

*Rex v. Rector, &c. of St. James's, Westminster.* 252

IV. *Abandonment of.*

11. Whether parish officers have power to *abandon* a poor-rate, after it has been allowed and published, *quære.* *Rex v. Justices of Cambridge (Town).* 238
12. When, after such allowance and publication, and notice of appeal by a party aggrieved, the parish officers give notice to the appellant of an abandonment of the rate, but refuse to pay his costs incurred up to that time about the appeal, the sessions have jurisdiction over the appeal if entered in pursuance of the notice; and are bound to quash it, if defective, for the reason assigned in the notice of appeal. *Ibid.*
13. And if the sessions refuse to go into the appeal, the Court will compel them to do so by mandamus. *Ibid.*

POSSESSION, ADVERSE.

*See* ADVERSE POSSESSION.

POSTEA.

*When Defendant entitled to.*

*See* PLEADING, 24, 25.

POWER.

I. *Where leasing Power duly executed.*

1. *A.*, tenant for life, is empowered to make leases, provided "the ancient and accustomed reservations be thereby reserved," and provided "they be granted in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements as are usually and customarily contained in leases of the same kind, in the respective parishes and places in which the premises are situate:"—

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Upon a question as to the validity of a lease granted by *A.*, other leases of lands in the same parish are admissible in evidence, for the purpose of shewing whether the lease in question satisfies the second proviso. *Doe d. Douglas v. Lock.* 807

2. *Semble*, that the true criterion of a reservation of the ancient and accustomed reservations, under the first proviso, is, the reservations contained in the lease made of the premises next preceding the creation of the power. *Ibid.*
3. *Dubitatur*, whether a *quarterly* reservation of rent, which had been previously reserved *half-yearly*, will vitiate the lease. *Ibid.*
4. It is no objection to such a lease, that in former leases a right of re-entry was reserved in the event of the rent being in arrear, and there being no *overt* distress upon the premises, and that in the lease under the power the word "*overt*" is omitted. *Ibid.*
5. The omission to reserve a heriot, where a heriot had been accustomedly reserved, would vitiate the lease. *Ibid.*
6. But a reservation of a heriot of "the best good of the person or persons who for the time being shall be tenant or tenants in possession of the demised premises," is sufficient, though the reservation in the former leases was of "the best good of *A. B.*, (the *cestui que vie* and lessee,) or such person as shall be in possession of the premises as tenant by virtue of the lease." *Ibid.*
7. A clause purporting to *reserve* and *except* to the lessor the power of hunting, &c. over the demised premises, enures as a *grant* from the lessee to the lessor of a *right* or *privilege*, and not as a reservation or exception. *Ibid.*
8. A clause in a lease, purporting to reserve underwood and under-ground produce, enures, not as a

reservation, but as an exception.

*Ibid.*

9. Where former leases contained an exception of "all and all manner of timber trees, and *trees likely to prove timber*," a lease under such power, containing an exception of "all timber trees, *bodies* of pollard and other trees whatsoever," granted at the same rent, was held to be void, on the ground that the *subject-matter* of the demise is increased by the alteration in the exception, and that no further rent is reserved in respect of such addition to the subject-matter of the demise.

*Ibid.*

### PRACTICE, CIVIL.

*And see* ARREST—ATTORNEY—COSTS—DEFAMATION, III.—NEWSPAPER, II.—PLEADING, (*passim*).

#### I. Irregularity.

##### (a) *In the Arrest.*

1. The Court will not discharge a defendant out of custody, on the ground that the plaintiff caused him to be arrested after he had consented to give him time, which has not elapsed, to pay the debt.  
*Udall v. Nelson.* 637

##### (b) *In the Declaration.*

2. Where (since the Uniformity of Process Act) the defendant is arrested upon a *capias* in *assumpsit*, and the plaintiff afterwards declares in covenant, the Court will set aside the declaration; but will not order that the bail be discharged.  
*Ward v. Tummon.* 876

#### II. Delivery of Copies of Paper Books.

3. An affidavit stating the omission by one of the parties, to deliver two copies of the paper book to the judges, pursuant to Reg. Gen. H. T. 1834, whereupon the adverse party delivered such copies, for which he has not been paid,

will not entitle him to object to the adverse party's being heard, unless notice has been given of the intention to make such objection, so as to give such party an opportunity of answering the affidavit.  
*Sandall v. Bennett.* 89

### III. Trial. *And see* NEW TRIAL—REPLEVIN.

4. Where a jury cannot agree in their verdict, they should either be discharged, or directed to deliberate further. *Dewar v. Purday.* 633
5. The judge cannot, in such case, without the assent of the plaintiff, direct a nonsuit. *Ibid.*
6. In no case can a plaintiff be nonsuited against his will. *Ibid.*
7. Where liberty is reserved to move to enter a nonsuit, such reservation proceeds upon the assent, express or implied, of both parties, to such reservation. *Ibid.*
8. A defendant insisting that the plaintiff has failed to prove a material fact, the judge gives him leave to move to enter a nonsuit upon the objection taken, and the cause proceeds. The jury disagreeing in their verdict, the judge has no power, without the further assent of the plaintiff, to direct a nonsuit. *Ibid.*

#### IV. Judgment.

9. The Court will now grant a rule to enter up judgment on a warrant of attorney, upon an affidavit shewing that the defendant was alive within a reasonable time; whether the day on which he is shewn to have been alive, be *in term* or not.  
*Jordan v. Farr and another.* 347
10. The Court granted a rule moved for on the third day of term, upon an affidavit stating that the defendant was alive on a day six days previously to the commencement of the term. *Ibid.*
11. It being shewn that one of two defendants who had given a *joint*

and several warrant of attorney, was alive within a reasonable time, the Court allowed judgment to be entered up as against him alone.

*Ibid.*

12. The Court set aside a judgment on a warrant of attorney entered up, (even before the late rules of H.T. 4 Will. 4,) where the defendant was dead at the time of signing judgment, although in the defeazance it was stipulated that the plaintiff should, without leave of the Court, be at liberty to enter up judgment, notwithstanding the defendant's death. *Heath v. Brindley.*

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13. Whether judgment entered up on a warrant of attorney more than twelve months old, without leave of the Court, but in pursuance of an express agreement on the defeazance that the plaintiff shall be at liberty to do so, is valid, *quære.*

*Ibid.*

#### V. Motion to deprive Plaintiff of Costs.

14. In an affidavit to ground a motion to deprive a plaintiff of his costs, on the ground that the subject-matter of the action was cognizable in a certain Court of Requests, a statement that the defendant *resides* at a place within the jurisdiction of the Court of Requests, without stating that he resided there at the time of the action brought, is insufficient. *Moreau v. Hicks.*

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15. *Semble*, that an action may be said to be brought for "the balance of an account originally exceeding 5l." where the aggregate amount of the items out of which the balance arose exceeds 5l., although at no one time was 5l. due. *Ibid.*

#### VI. Judge at Chambers. See Costs, 18.

#### VII. Ejectment.

And see EJECTMENT, 5.

16. Where a declaration in ejectment

is served upon the son of the tenant in possession, before the first day of term, and the latter afterwards acknowledges that he has received the declaration, such acknowledgment is not sufficient to entitle the plaintiff to a rule for judgment against the casual ejector, unless it appears thereby that the declaration came to the hands of the tenant before the first day of term.

*Doe d. Marshall v. Roe.* 553

17. The rule of H. 4 Will. 4, requiring pleadings subsequent to the declaration to be *delivered* between the parties, does not apply to actions of ejectment,—which are left to the old practice. *Doe d. Williams v. Williams.*

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18. In ejectment, judgment was signed by the plaintiff as for want of a plea, and writs of possession were sued out and executed. The defendant had left a plea at the judge's chambers. The defendant obtained a judge's order to set aside the judgment and writs of possession, and commanding *the sheriff* to restore the possession: Held, that the order ought not to have been made *on the sheriff*, and that writs of restitution issued upon the order, were irregular. *Ibid.*

#### VIII. Affidavits upon Rule nisi.

And see AFFIDAVIT.

19. A party who had obtained a rule nisi, which was afterwards enlarged upon the terms of filing the affidavits in answer before a certain day, was permitted to move to make his rule absolute, although he had omitted to take *office copies* of such affidavits. *Pitt, administrator of Pitt, deceased, v. Coombs.*

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#### IX. Execution in aid of inferior Court.

20. Where a defendant, after judgment in an action in the Common Pleas at Lancaster, has removed

*his person* out of the jurisdiction of the County Palatine, a superior Court, upon an affidavit of these facts, (without shewing that he has also removed his *goods*) will, under 4 & 5 Will. 4, c. 62, s. 31, order a *capias ad satisfaciendum* to issue. *Lord v. Cross.* 30

**X. Ordering Attorney to deliver up Papers.**

21. Where a rule nisi, calling upon an attorney to shew cause why he should not deliver up deeds, &c. to his client, has been obtained and enlarged, the attorney may shew for cause, that in the intervening vacation he was, by an order of the Court of Chancery, required to deliver the same deeds, &c. into the hands of the officer of that Court, upon a day earlier than that on which such cause is shewn. *In the matter of Walmsley, Gent. one, &c.* 543

22. The Court will not order an attorney to deliver up papers, &c., when, by an order of another Court, such attorney has been required to deliver them up to the officer of the latter Court. *Ibid.*

**PRACTICE, CRIMINAL.**

*Indictment in K. B., Certificate of.*

A prosecutor is entitled to a *certificate* from the crown office, of an indictment having been found, upon payment of the customary fee for the *certificate*, without payment for a *copy of the indictment* also. *Rex v. Redfern.* 198

**PREROGATIVE COURT.**

*See PROHIBITION.*

**PRINCIPAL AND AGENT.**

*See AGENT.*

**PRINTS.**

*See COPYRIGHT.*

**PRIVILEGED COMMUNICATION.**

*See EVIDENCE, 12.*

**PRIVY COUNCIL.**

*Judicial Committee.*

1. The Lords of the Privy Council cannot be required by *mandamus* to rehear the matter of an appeal to them from the Arches Court of Canterbury, upon which they have decided; nor can they be so required to receive a petition to his Majesty in Council to rehear. *Ex parte Carmichael Smyth.* 582

**PROHIBITION.**

*To restrain Proceedings in Ecclesiastical Court.*

1. The Court refused to issue a writ of prohibition to the Prerogative Court, inhibiting them from proceeding further against an attorney, in the matter of a party deceased, until his lien upon the will of such deceased party should have been satisfied, upon affidavits, shewing that the attorney who had the will in his possession had a common law lien upon it, which the parties interested had refused to discharge, and stating that the attorney had been served with a citation out of the Prerogative Court, requiring him to bring the will into the registry, and leave it there; and adding, on information and belief, that the Prerogative Court would decree him to give up the possession without satisfaction of his lien.
2. *Quære*, whether the Court would grant a prohibition, if it should appear that the Prerogative Court had actually refused to recognize the lien.
3. *Semble*, that a prohibition would not be granted. *Ex parte John Law.* 7

**PUBLIC POLICY**

Said to be an unsafe and unsatisfac-



tory, though a legal, ground of decision. *Rex v. Inhabitants of St. Gregory, Canterbury.* 137

#### QUARTER SESSIONS.

*See* SESSIONS.

#### RAILWAY ACT.

By a local act, power is given to a company to take lands for the purpose of making a railway, upon giving compensation; and it is enacted, that in case the parties cannot agree, a jury shall be summoned to ascertain the value of the land, and to assess compensation for the injury which parties interested in the land would sustain, by reason of the execution of the act,—which value of the land and compensation they are required to ascertain and settle separately. The company required the land in which a market-gardener had a term for years; and a jury, summoned under the powers of the act, (not being called upon by the company or the claimant to separate the value of the leasehold interest from the compensation for damages) gave a verdict for an entire sum “as a satisfaction for all losses and damages.” Held, that the company could not treat this verdict as a nullity and require a new jury to be summoned. *In re London and Greenwich Railway Company.* 458

#### REASONABLE TIME.

*See* ARREST, 2, 3.

#### RECOVERY.

*Where it bars Uses created by a Will.*

*See* DEVISE, 5, 6.

#### REFRESHING MEMORY OF WITNESS.

*What Documents may be looked at for this Purpose.*

*See* EVIDENCE, 18—WITNESS.

#### RELEASE.

*Effect of Award of general Releases.*

*See* ARBITRAMENT, 10—POWER.

#### RENT.

*See* DISTRESS—PLEADING, 24—POWER.

#### REPLEVIN.

*Abandoning Cognizance at Trial.*

In replevin, the defendant makes cognizance, first, under a demise by *A.* to *B.*; secondly, under a demise from *B.* to the plaintiff. Plea in bar to each cognizance, *non tenuit*. The defendant may at the trial abandon the second cognizance, and examine *B.* in support of the first issue, *B.* stating, on the *voir-dire*, that he did not employ the attorney. *King v. Baker.* 228

#### REPUTATION.

*See* EVIDENCE, 24.

#### RESERVATION.

*See* POWER.

#### RESTITUTION, WRIT OF.

*And see* PRACTICE, 18.

Whether it is a valid objection to a writ of restitution, that *no præcipe* had been issued, or that the writs themselves were only sealed and not signed, *quære*. *Doe d. Williams v. Williams.* 259

#### REVERSIONER.

*When barred.*

*See* ADVERSE POSSESSION.

#### RULES OF COURT.

*See* ARBITRAMENT, 11, 12—ATTORNEY, 1—COSTS, 9, 14, 16, 17—PLEADING, 15, 16, 18, 19, 28, 29—PRACTICE, 3, 9, 10, 11, 12, 16, 17, 18—TENDER.

#### SALARY.

*See* MASTER AND SERVANT.

## SELECT VESTRY.

See VESTRY.

## SERVANT.

See MASTER AND SERVANT.

## SESSIONS.

And see JUSTICES—ORDER OF SESSIONS—POOR-RATE—SETTLEMENT.

## I. Jurisdiction under Vagrant Act.

1. Where, upon appeal against a conviction under the Vagrant Act, (5 Geo. 4, c. 84,) the sessions confirmed the conviction subject to a case for the opinion of this Court, a subsequent sessions may, after this Court has affirmed the order of sessions, or after the time for removing the order of sessions has elapsed without any certiorari having been awarded, issue the necessary process for the apprehension and punishment of the offender, according to the conviction. *Rex v. Justices of Warwickshire.* 370

## II. When compellable to hear Appeal.

See POOR-RATE, 12, 13.

## III. Costs of Appeal.

2. The sessions have power to grant costs under 8 & 9 Will. 3, c. 30, s. 3, in all cases in which an appeal has been entered and determined, whether the determination were upon the merits or for defect of form. *Rex v. Inhabitants of Cottingham.* 215

## IV. Facts, finding of, in special Case.

See FRAUD, 1—SETTLEMENT, 6, 7.

## SET-OFF.

## I. What may be set off.

1. A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded. *Braithwaite v. Coleman.* 654

2. A plea of set-off on a bill of exchange, payable to the order of the defendant, and accepted by the plaintiff, is not supported by evidence of a bill, answering to the description on the plea, which at the time of action brought was in the hands of a third party, although, before plea pleaded, the bill had got back to the hands of the defendant. *Ibid.*

## SETTLEMENT.

## I. By Apprenticeship.

And see STAMP, 2.

1. Where a statute, incorporating guardians of the poor of a certain district, enacted that it should be lawful for the corporation to bind out any poor child apprentice for any number of years, "provided such child be not bound for a longer term than until he or she shall have attained the age of twenty-two if a boy, and twenty if a girl;" it was held, that an indenture by which a boy, aged fifteen years and a half, was bound for seven years, was voidable only, and not void; and that, therefore, a settlement might be gained under it. *Rex v. Inhabitants of St. Gregory, Canterbury.* 137
2. *A.* is apprenticed to *B.* and *C.* partners. The partnership being dissolved, *B.* removes, and *A.* serves *C.* and his new partner, *D.* After the death of *C.*, *A.* continues to serve *D.* in another parish. It not being found by the sessions that the service under *D.* was with the consent of *B.*, this Court will not refer the service to the apprenticeship. No settlement is, therefore, gained by *A.* in the parish in which he served and resided with *D.* *Rex v. Inhabitants of St. Martin, Exeter.* 388

## II. By Estate.

3. *A.* being with *B.*, *C.*, and *D.*, next of kin to an intestate, takes out administration, and then all four

join in a mortgage of a leasehold tenement, in the parish of Dale, formerly the property of the intestate, and divide between them the money advanced. Subsequently B., in consideration of a sum of money then paid, verbally agrees with C. to sell him all his interest in the tenement, and after a lapse of some time joins A. and D. in releasing all their interest to C. Held, that B. did not, by a residence in Dale for forty days between making the agreement and executing the release, gain a settlement by estate in that parish. *Rex v. Inhabitants of Cregrina.* 455

4. A woman, being yearly tenant at 50s. a year, marries. Her husband, by forty days residence on the premises, gains a settlement by estate. *Rex v. Inhabitants of Barnard Castle.* 128
5. But when a man, being yearly tenant, dies, and his wife occupies and pays rent as one of the next of kin, but, without taking out letters of administration, the wife neither gains a settlement herself, nor is a settlement gained by a second husband, by reason of his marriage with her during such occupation, and of forty days' residence. *Ibid.*
6. Whether the widow of a yearly tenant, who, without taking out administration, continues the occupation and pays rent, is to be considered as holding in her own right, or as next of kin, with an incomplete representative character, is a question of fact to be found by the sessions as a fact. *Ibid.*
7. But the Court will not send back a case of this nature to be re-stated, except in case of urgent necessity. *Semble.* *Ibid.*
8. To prove a settlement by estate in the parish of A., it is competent to the parish of B. to produce a deed, purporting to convey land in the parish of C., and to shew

by parol that such land is situate in A. *Rex v. Inhabitants of Wickham.* 406

### III. By Hiring and Service.

9. A person inrolled as a member of a volunteer corps, is not sui juris, so as to be able to make a valid contract of service for a year. *Rex v. Inhabitants of Winesham.* 447
10. A hiring under which the servant is to work ten hours a day, from five in the morning to six in the evening, and to leave off in the middle of the day on Saturday, so as to make up the ten hours a day, is an exceptive hiring. *Rex v. Inhabitants of Norton-Bavant.* 687

### IV. By renting &c. a Tenement.

11. No settlement can be gained since the passing of 1 Will. 4, c. 18, by the renting and occupation of a tenement, by a party who allows an undertenant to have the exclusive occupation of rooms in the tenement, for however short a period such occupation may continue, and however small may be the sum paid in consideration of it. *Rex v. Inhabitants of St. Nicholas, Colchester.* 422
12. *Semble*, that a letting of rooms by an innkeeper to his guests, is not such an underletting as would defeat the settlement. *Ibid.*
13. A. having originally entered into the service of B., the owner of a kiln, yard, and sheds, as a maker of pots, an agreement is subsequently entered into, by which A. is to pay B. 6l. after each burning, for the use of the kiln &c., and for furnishing and preparing the clay, and for carting the clay and pots, and to do as he pleased with the ware; A. occupied for more than a year, and his occupation was worth more than 10l. a year:—Held, that he gained a settlement. *Rex v. Inhabitants of Iken.* 117

14. A man rented a tenement at 10l. a year, in A., and occupied for seven months. At the end of the period an order for his removal to B. was made, but suspended by reason of his sickness, during which he continued to occupy the tenement. Afterwards, he was removed to B., but returned on the same day to A., and continued to reside in the tenement until the expiration of more than twelve months from the commencement of his occupation:—

Held, that the occupation was, for the purposes of settlement, interrupted by the residence *under the suspension* of the order, and that therefore no settlement was gained. *Rex v. Inhabitants of St. John, Hackney.* 336

15. Held also, that the *execution* of the order, by actual removal, was, under the circumstances, *no interruption* of the occupation. *Ibid.*

#### V. By serving an Office.

16. An office in a parish, to which the officer may be appointed for any *discretionary* period, is not an *annual* office within 3 & 4 Will. & Mary, c. 11, s. 6, and 9 & 10 Will. 3, c. 11. *Rex v. Inhabitants of Middlewich.* 682

17. Therefore, a man in fact appointed to and serving such office for a year, and residing within the parish, cannot gain a settlement thereby. *Ibid.*

18. Where in case of a general appointment to an office, such appointment will enure as an appointment for a year, the office is an *annual* office within those statutes. *Ibid.*

19. No settlement is gained by the execution of an office (*e.g.* that of pinder for a town) to which the party is appointed at a court held within and for a manor, which manor does not extend over the whole town, there being no special custom warranting such appoint-

ment. *Rex v. Inhabitants of St. Mary, Newmarket.* 693

### SEWERS-RATE.

#### I. What Property ratable.

1. All persons whose property derives any advantage from the works of the commissioners of sewers, may be assessed to the sewers rate in respect of that property. *Soady v. Wilson.* 777

2. And property drained by sewers and drains originally made and always repaired by persons independent of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed. *Ibid.*

3. Held, that apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are ratable by the commissioners of sewers for the city and liberty of Westminster and parts of Middlesex, although Somerset House is, by act of parliament, vested in the crown free from all incumbrances, for the purpose of establishing within the same that amongst other public offices. *Ibid.*

4. By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the *sewers-rate*, as occupiers of premises ratable thereto, who are *de facto* rated, in respect of such premises, to the *poor-rates* of the parishes to which that act applies. *Ibid.*

### SHERIFF.

#### And see INTERPLEADER ACT.

#### I. Duties of.

1. A sheriff is not bound upon service of a copy of the calendar of

- prisoners, signed by a judge of gaol delivery at the assizes, to execute prisoners against whom the sentence of death has been passed, unless such prisoners are in his legal custody. *Rex v. Antrobus, Esq.* 565
2. Therefore, where a county gaol, and the custody of the prisoners in such gaol belonged to a patent officer, independent of the sheriff, it was held that the sheriff was not legally bound, upon receiving the calendar, to demand to have the prisoner delivered to him by such patent officer, for the purpose of executing him. *Ibid.*
  3. In such case, in order to make the liability of the sheriff complete, the Court in which the prisoner is condemned should, by a writ of habeas corpus, or other mandate, require the patent officer to deliver the prisoner to the sheriff, and should by another writ or mandate require the sheriff to receive and execute him. *Ibid.*
  4. Whether a special order of the Court to the patent officer and the sheriff, (they being both bound to be present in Court,) would be sufficient, *quære.* *Ibid.*
  5. Mere notice of the sentence, and of the liability of the sheriff to execute, is not a sufficient warrant to the patent officer to deliver the prisoner to the sheriff for execution. *Ibid.*
  6. Where the sheriff has the custody of the prisoner, the judgment of the Court passing sentence of death upon him, is, without any warrant or copy of the calendar, sufficient to authorize and require the sheriff to do execution. *Ibid.*
  7. The copy of the calendar, signed by the judge, is a mere memorial. *Ibid.*

II. *Liabilities of.*

8. Action against, for escape.  
See EVIDENCE, 5.

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SHIFTING USE.

See DEVISE, 3, 4, 5.

SHIP.

See INSURANCE.

SLANDER.

See DEFAMATION.

SOMERSET HOUSE.

See SEWERS-RATE, 3.

SPECIAL CASE.

I. *Presumption in favour of finding of Sessions.*

1. Where, upon a special case, it appeared that evidence had been received by the Court of Quarter Sessions, which would not be admissible without a previous inquiry, not stated to have been made, the Court of King's Bench refused to presume that such inquiry had been made. *Rex v. Inhabitants of Rawden.* 97

II. *Where Court will send back for Re-statement.*

And see FRAUD — POOR-RATE, 3—  
SETTLEMENT, 7.

2. The Court refused to send the case back to the sessions to be re-stated, in order that the omission of such a statement might be supplied. *Ibid.*

SPIRITS, SALE OF, IN SMALL QUANTITIES.

See DEBTOR AND CREDITOR, 1.

SPORTING, RIGHT OF.

*How demisable.*

See INCORPOREAL HEREDITAMENT—  
POWER, 9.

## STAMP.

I. *Agreement, &c.*

1. An "agreement, minute, or memorandum of agreement," is liable to be stamped only where the instrument is *per se* binding on the parties to it. Per *Patteson, J. Rex v. Inhabitants of St. Martin, Leicester.* 202

II. *Apprentice, Transfer of.*

2. *A.* is apprenticed to *B.*, who was a tinman, by the trustees of a charitable fund, and the premium paid out of that fund. *A.* serves *B.* three and a half years; at the end of which time *B.*, at *A.*'s request, verbally, and without the knowledge of the trustees, consents that *A.* shall serve the remainder of his time with *C.*, a plumber, and agrees to give to *C.* 6*l.* "as part of the 15*l.* paid as a premium on the binding of *A.*," for taking him:—Held, that the 6*l.* was a valuable consideration paid to *C.*, "other than was given by any parish or township, or any public charity," and that therefore the transfer of *A.* to *C.* was void for want of a stamped assignment under 55 *Geo.* 3, c. 184, sched. 1, Apprenticeship. *Rex v. Inhabitants of Fakenham.* 553

III. *Award.*

3. *A.* and *B.* having a dispute as to the liability of *B.* to pay money to *A.*, agree to submit a case to a barrister, and to be bound by his opinion. *Semble*, that in an action brought to enforce such payment, the opinion of a barrister upon a case so submitted, is admissible in evidence without an award stamp. *Boyd v. Emerson and others.* 99
4. *Semble* also, that supposing an award stamp to be necessary, a stamp proportioned to the number of words on the opinion alone, without the case, is sufficient, al-

though the opinion be annexed to the case, and refers to the case thus:—"Upon the facts stated I am of opinion," &c. *Ibid.*

IV. *Feoffment.*

5. A feoffment in consideration of natural affection, and also of 10*s.*, does not, under 55 *Geo.* 3, c. 184, require two separate stamps of 1*l.* 15*s.* each. *Doe d. Wheeler v. Wheeler.* 10

V. *Mortgage.*

6. A mortgage to secure a principal sum, and also the costs of the trustees, and a reasonable sum by way of compensation to them for their trouble, requires only a stamp of such an amount as will cover the principal sum, *semble*. *Pad-don v. Bartlett.* 1
7. The transfer duty on mortgages is imposed only where no further sum is advanced. *Ibid.*
8. Where an additional sum is advanced, it is sufficient to pay the ad valorem duty on such additional sum. *Ibid.*
9. So where the original mortgage was for a term, and the second deed is a mortgage in fee, and the term is assigned to secure the mortgage money. *Ibid.*

VI. *Policy of Insurance.*

*See* INSURANCE.

VII. *What cases within 44 Geo. 3, c. 98, s. 10.*

*See* NEWSPAPER, 1, 2.

## STATUTES.

*And see* ASSESSED TAXES, 1, 2—ATTORNEY, 4, 5, 7, 8, 9, 10—BANKRUPT—BASTARDY, 1—BRIBERY—BUILDING ACT—COPYRIGHT—COSTS, I. II. III.—DEBTOR AND CREDITOR—ERROR—FRAUDS, STATUTE OF—HUNDRED, ACTION AGAINST—INSOLVENT DEBTOR—IN-

**TERPLEADER ACT**—JUSTICES 1, 2, 9—**LIMITATIONS, STATUTES OF—LUNATIC—MONEY PAID—NEW TRIAL, 5—NEWSPAPER, 1, 2—PLEADING, 11, 12, 13, 21, 36—POOR-RATE—PRACTICE, 20—RAILWAY ACT—SESSIONS, 1, 2—SETTLEMENT—SEWERS-RATE—STAMP—TENDER—TURNPIKE—USURY, II.—VOLUNTEER.**

*When it shall take effect.*

Although in an act of parliament, it is expressly enacted, that it shall *commence and take effect from a day named*, yet, if the royal assent be not obtained until a day subsequent, the provisions of a particular section, in its terms *prospective*, do not take effect until such subsequent day. *Burn and another v. Carvalho and others*, (in error). 893

### STEWARD.

*Entries by, against whom Evidence.*  
See EVIDENCE, 11.

### STOLEN GOODS.

*Recovery of Value by Owner, from Vendee of Thief.*  
See TROVER, 1.

### STOPPAGE IN TRANSITU.

*Transitus, when determined.*  
Part delivery, by a carrier, to the consignee, is *prima facie* such a virtual delivery of the whole as puts an end to the consignor's right of stoppage in transitu. *Betts and Drewe v. Gibbins.* 64

### TAXES.

See ASSESSED TAXES—MONEY PAID.

### TENDER.

- I. *Where pleadable.*
1. A tender before action brought, is not pleadable to an action for un-

liquidated damages. *Searle v. Barrett.* 200

2. In an action by landlord against tenant, for not repairing, the Court refused to allow the defendant to pay money into Court by way of compensation and amends, under 3 & 4 Will. 4, c. 42, s. 21, under the plea given by Reg. 17, H. T. 4 Will. 4, and under a plea of tender before action brought. *Ibid.*

### TERMOR.

See ADVERSE POSSESSION—HUNDRED, ACTION AGAINST, 1, 2.

### TIME.

*Computation of.* See JUSTICES, 8, 9.

### TORT-FEASOR.

*Action by, on Promise to indemnify.*  
See INDEMNITY.

### TRADE AND BUSINESS.

- I. *Distinction between.*  
See COVENANT.
- II. *Goods, in custody of Tradesman, when not liable to be distrained.*  
See DISTRESS, III.

### TRANSFER OF MORTGAGE.

*Stamp Duty upon.* See STAMP, V.

### TREES.

*Exception of.* See POWER.

### TRESPASS.

See PLEADING, II. 17.

### TRIAL.

*Course to be pursued when Jury cannot agree.*  
See PRACTICE, III.

### TROVER.

- And see LIMITATIONS, STATUTES OF, II.*
1. The owner of goods stolen, who

prosecutes the thief to conviction, is entitled to recover the value of them in trover, from a person who has purchased them from the thief, but *not in market overt*, and who has re-sold them in market overt, after notice of the felony, but before conviction. *Peer v. Humphrey.* 430

2. *Sebble*, that a destruction by bailee of part of the goods deposited, he having the residue (uninjured by the destruction of the other part) in his possession, ready to be delivered up, will not entitle the bailor to maintain trover for the whole. Per *Patteson, J. Philpott v. Kelly.* 611

3. The forcible taking possession of a house and fixtures by the assignee of a term in the house, is not a conversion of such fixtures. *Longstaff and another v. Meagoe.* 211

## TRUSTEE.

### I. Conversion of Trust into a Legal Liability.

1. *A.*, seised of lands in trust to pay the net rents to *B.*, receives 27*l.* rent, and pays 10*l.* into a bank, with directions for it to be paid to *B.* on his giving a receipt for 27*l.*:—Held, that this is evidence of an acknowledgment of a debt to *B.*, upon which *B.* may maintain an action upon an account stated. *Roper v. Holland.* 668
2. Held also, that *A.* is precluded from shewing that at the time of the acknowledgment no balance of rent was in fact due. *Ibid.*

## TURNPIKE.

### I. Lease of Tolls.

1. By a local turnpike act it is provided, that in leases of the tolls, the rent shall be made payable to the *treasurer*; and that in default thereof, *every such lease shall be null and void to all intents and purposes*

*whatsoever.* A lease is made, whereby the rent is reserved to the *trustees* or their *treasurer*:—Held, first, that the reservation in the alternative is bad, within the former part of this clause:

2. And secondly, that the words "null and void, to all intents and purposes," are to be construed as meaning *absolutely void*, and not voidable only:
3. And thirdly, that the above provision is not repealed by either of the General Turnpike Acts, 3 *Geo.* 4, c. 126, and 4 *Geo.* 4, c. 95, but remains in full force. *Pearce v. Morrice.* 48

## UNDERLETTING.

See SETTLEMENT, 11, 12.

## UNDER-SHERIFF'S NOTES OF TRIAL.

See NEW TRIAL, 5.

## UNDERWRITERS.

*Effect of Consolidation Rule in Actions against.*

See INSURANCE.

## UNLIQUIDATED DAMAGES, ACTION FOR.

I. *Arrest in.* See COSTS, 8.

II. *Plea of Tender to.* See TENDER.

## USE AND OCCUPATION.

See PLEADING, 30, 31.

## USES.

See DEVISE—TRUSTEE.

## USURY.

I. *Under cover of a simulated sale.*

1. As a cloak for an usurious loan, *A.* purchases of *B.*, for ready money, malt, which he immediately resells to *B.* at an advanced price,



payable in bills, the malt to be held by *A.* as a security. *B.* demands the malt without paying the bills. Held that *B.* may recover in trover the full value of the malt, without deduction or recouper of the money received by him upon the simulated sale. *Hargreaves v. Hutchinson.* 11

**II. Toleration of, upon Bills and Notes not having more than Three Months to run, by 3 & 4 W. 4, c. 98, s. 7.**

2. Bills and notes not having more than three months to run, by which more than 5*l.* per cent. interest is secured, or which are discounted on usurious terms, are since 3 & 4 W. 4, c. 98, *available securities* for all purposes for the whole amount which they were intended to secure, including the usurious interest. *Connop v. Yeates.* 302

3. Therefore a warrant of attorney, given to secure the amount of an usurious bill at three months, which had been dishonoured at maturity, was held also to be protected by the act. *Ibid.*

**III. Form of Declaration for Penalties.**

4. In debt *qui tam* for penalties for usury in the renewing and discounting of bills, it is necessary to prove that the usurious contract was entered into on the precise day which is laid in the declaration, even though it be laid under a *videlicet.* *Fox qui tam v. Keeling.* 523

**VAGRANT ACT.**

*See* SESSIONS, 1.

**VARIANCE.**

*See* PLEADING, 23.

**VENDOR AND PURCHASER.**

*See* ASSUMPSIT, 1—WARRANTY OF SOUNDNESS.

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**VERDICT.**

*See* EJECTMENT, 5—NEW TRIAL—PRACTICE, III.

**VESTRY.**

**I. Power of Vestry to bind Parish.**

*See* OVERSEER, 8.

**II. Who are to be Select Vestrymen.**

1. An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish. *Rex v. The Justices of Kent.* 299

2. An overseer may be a select-vestryman by virtue of an election by the parishioners, although he be also a member of the select vestry by virtue of his office. *Ibid.*

3. The magistrates are *bound*, under 59 Geo. 3, c. 12, to appoint all persons nominated and elected by the parishioners to be members of the select vestry, and have no discretion to reject any person so nominated and elected. *Ibid.*

**VICAR.**

*And see* DILAPIDATIONS.

*Amotion of Parish-Clerk by.*

*See* PARISH-CLERK.

**VOLUNTEER.**

1. A person inrolled as a member of a volunteer corps, is not *sui juris*, so as to be able to make a valid contract of service for a year. *Rex v. The Inhabitants of Winesham.* 447

2. It is not necessary, in order to make a man, inrolled as a volunteer, an effective member of his corps, that he should have taken the oath of allegiance required by the Volunteer Act, 44 Geo. 3, c. 54, s. 20. *Ibid.*

**WAGES.**

*See* MASTER AND SERVANT.

3 R

## WARRANT OF ATTORNEY.

*And see PRACTICE, IV.*

*Entering up Judgment upon.*

Where an old warrant of attorney was given to secure the doing of an act (the re-transfer of stock) *upon demand*, the Court refused permission to enter up judgment, on proof of a demand made whilst the defendant was insane. *Capper and others v. Dando.* 335

## WARRANTY OF SOUNDNESS.

*I. When may be sued upon.*

1. Where an unsound horse is sold with a warranty of soundness, the purchaser may maintain an action on the warranty, although, shortly after the sale, he discovers the unsoundness, and, without giving notice of that fact to the seller, keeps and uses the horse for nine months as his own, and during that time administers physic to it, and uses other means to cure it. *Pat-teshall v. Tranter.* 649

*II. What may be recovered in Action upon.*

2. Where a horse, warranted sound, turns out to be unsound, and is, after notice to the seller, re-sold by the purchaser, the latter may recover not only the difference of price between the first and second sales, but also the keep of the horse for a reasonable time. *Chesterman v. Lamb.* 195
3. But the question, whether the horse has been kept an unreasonable time before the re-sale, is a

question for the jury; and if the seller rests his defence on the soundness of the horse, and does not request the judge to leave the question of time to the jury, the Court will not, upon motion for a new trial, look into the evidence upon this point. *Ibid.*

## WILL.

*And see DEVISE—EVIDENCE, 1, 2.*

*I. Construction of, in general.*

1. That construction of a will is to be preferred, which, consistently with the rules of law, gives effect to the greatest part of it. *Gallini v. Doe d. Gallini* (in error). 894
2. Whether the doctrine that a general intent is to be preferred to a particular intent manifested in a will, is incorrect and vague, *quære.* *Ibid.*

*II. Construction of Bequest of Chattels.*

*See FIXTURES.*

## WITNESS.

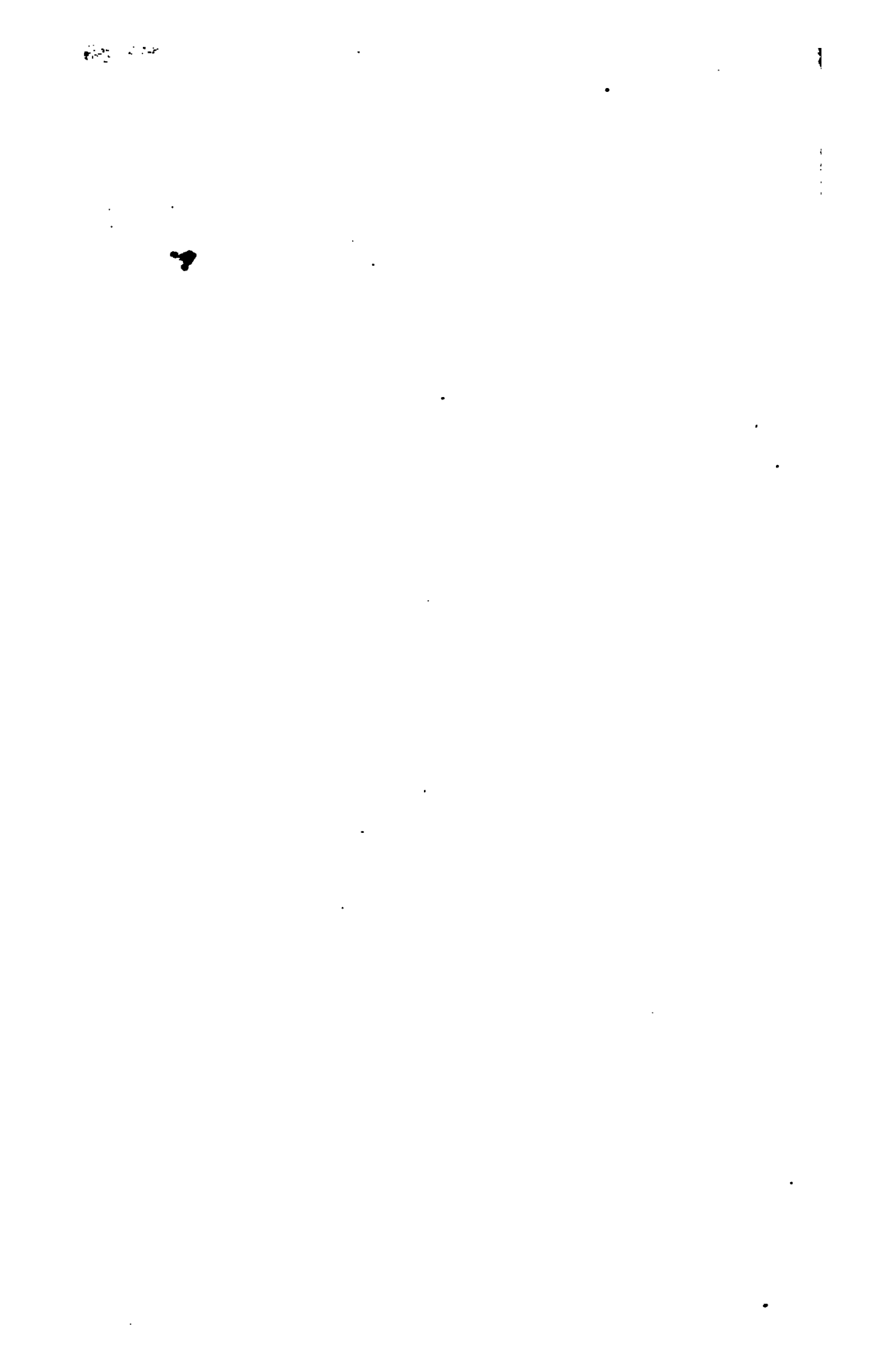
*And see EVIDENCE—REPLEVIN.*

*Refreshing Memory of.*

Held, that a clerk might refresh his memory as to the delivery of goods, by looking at entries made in his presence by his master in a ledger, from entries made by the clerk in a waste book,—such entries in the ledger having been checked by the clerk while the facts were fresh in his recollection; and held, that the waste book need not be produced. *Burton v. Plummer.* 315

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TEMPLE BAR.





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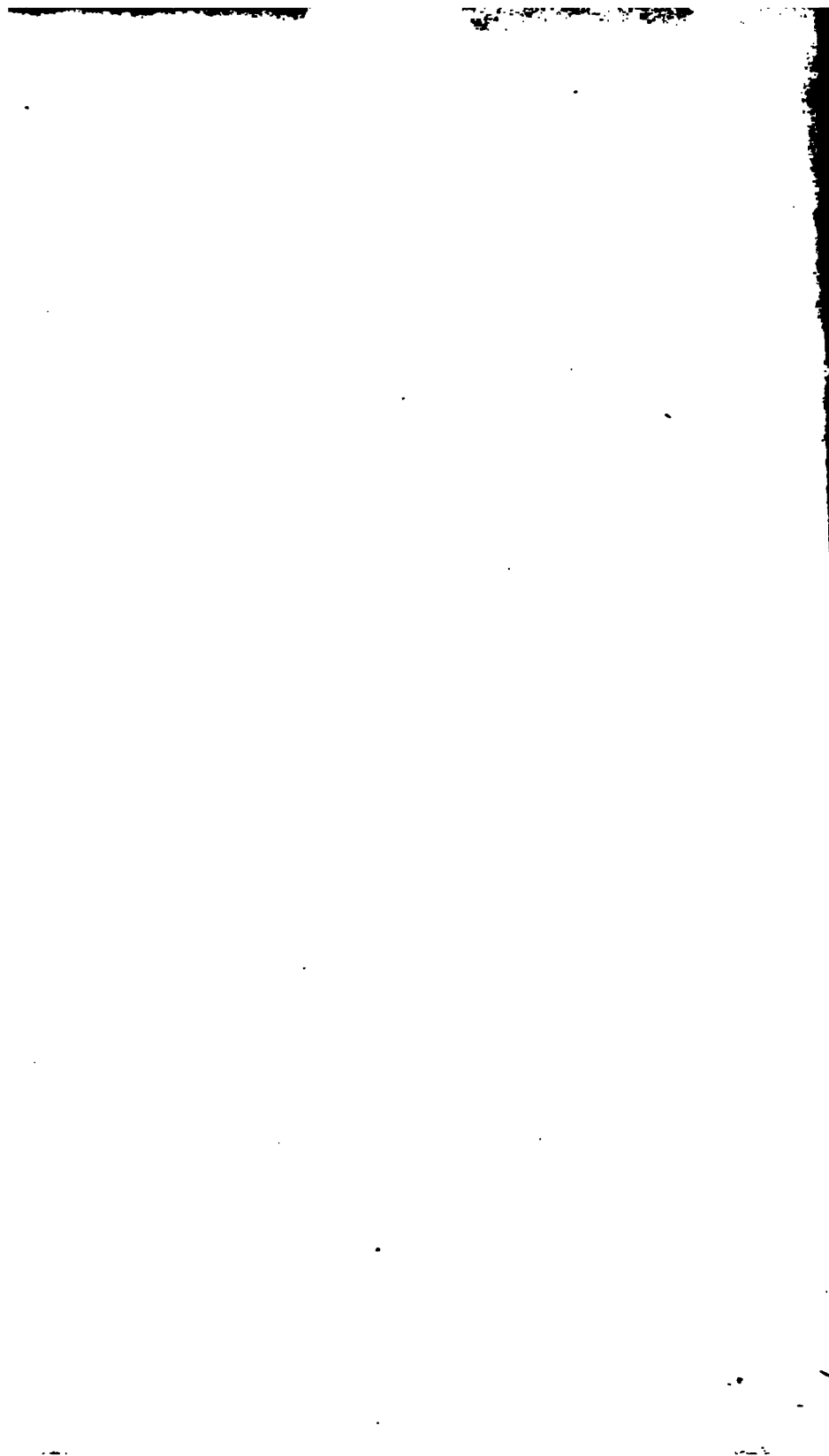
















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